# Managing Your Courtroom: Practical Solutions to Common Courtroom Issues

Michigan Judicial Institute

June 12, 2007

## Dealing with Troublesome Attorneys

Faculty

- Hon. Gary J. Bruce, 5th District Court, Berrien County
- Hon. William J. Giovan, 3rd Circuit Court, Wayne County
- Mr. Stephen P. Vella, Attorney Grievance Commission

## Dealing with Troublesome Attorneys – cont'd

- The unduly vociferous attorney
- The attorney who fails to take direction
- The attorney who doesn't "play well with others"
- The dishonest attorney
- The tardy/absent attorney
- The incompetent attorney
- The impaired attorney
- Miscellaneous attorney issues

# BASIC* CONTEMPT FLOWCHART

**1. Is the act or failure to act contemptuous?**

I.e., does it (a) violate a court order, (b) impede the functioning of the court, or (c) impair the authority of the court?

**and**

Is it not excluded from contempt sanctions by statute?

**No**


Do not use contempt proceedings.

**Yes**

**2. Is contempt direct or indirect?**

Direct = contempt in immediate view and presence of a sitting court. All relevant information is known personally by judge.

Indirect = all other contempt.

**Indirect**

**Direct**

**3A. Is contempt civil or criminal?**

Civil = court's purpose in imposing sanctions is to restore status quo.
Criminal = court's purpose in imposing sanctions is to punish defendant for past misconduct.

**Defer proceedings**

Judge must disqualify himself/herself.

**No**

**3B. May summary proceedings be used?**

Summary proceedings may only be used if they are essential to restore the status quo or order in the courtroom.

**Civil**

**Criminal**

**Yes**

**4A. Hold trial**

Give defendant all procedural safeguards he/she would be entitled to in a civil trial. E.g., petition, affidavit, contested hearing, rules of evidence, etc. **Except, no right to jury trial.**

**4B. Hold trial**

Give defendant all procedural protections he/she would be entitled to in a criminal trial of equal gravity. E.g., petition, affidavit, contested hearing, rules of evidence, court appointed attorney, right against self-incrimination, etc. **Except, no right to jury trial.**

**4C. Hold summary proceedings**

Summary proceedings may be used for both civil and criminal contempt. Because procedural rules differ, judge must determine beforehand whether the contempt is civil or criminal. (See Step 3A.) In civil contempt, defendant does not have right against self-incrimination, and burden of proof is preponderance of evidence.* In criminal contempt, defendant does have right against self-incrimination, and burden of proof is beyond a reasonable doubt. During summary proceedings, judge may proceed on own knowledge and adjudge guilt of defendant.

* Some courts have used "clear and convincing evidence" as standard.

**5. Impose sanctions**

**Civil contempt**

(a) Conditional jail sentence.
(b) Fine, costs, and expenses.
(c) Damages (mandatory).
(d) Attorney fees incurred in contempt proceedings.

**Criminal contempt**

(a) Fixed jail sentence up to 93 days.
(b) Fine of not more than $7,500.00.
(c) Probationary term (optional).
(d) Damages (mandatory).
(e) Attorney fees incurred in contempt proceedings.

* This chart is not applicable to specialized contempt proceedings, such as failure to pay child support [MCL 600.1701; MCR 3.928], violation of parenting time orders [MCL 552.641], violating a PPO [MCL 600.2950, MCR 3.708], and other situations outlined in MJI's *Contempt of Court Benchbook,* Chapter 5.

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE, MICHIGAN

_____ v _____ Case No. _____

**IT IS HEREBY ORDERED** that the following procedures shall apply in the trial of the above action:

1. **MOTIONS IN LIMINE.** Motions in limine should be presented on the day of trial, with sufficient notice to the opposite party. Such motions may be filed in advance of trial if there is reason to do so.

2. **VOIR DIRE.** The court will ask all questions of general application. If the court's questioning of an individual juror on a specific topic should leave a party unsatisfied, that attorney may directly ask additional questions of that juror on that topic.

The purpose of this arrangement is to avoid questioning by counsel designed primarily to argue the case, to commit jurors to a particular view of the case, to make an opening statement, to gain rapport with jurors, and the like, and the privilege of questioning particular jurors should not be used for those objectives.

3. **EXHIBITS.** The parties are encouraged to consult about what exhibits will be admitted without objection.

Exhibits are marked during the trial in numerical sequence without regard to the party offering them. For example, plaintiff's exhibit 5 might be followed by defendant's exhibit 6, even if it is the first of defendant's exhibits.

Before questioning a witness about a proposed exhibit, have it marked and refer to it by exhibit number in the first reference to it. For example, "I hand (show) you proposed exhibit 1 and ask you ....."

4. **DEPOSITIONS.** A party intending to introduce a deposition must advise the opponent in sufficient time that counsel have the opportunity to discuss proposed objections outside of trial hours and before the deposition is offered. The court will rule on objections that do not result in agreement.

5. **OBJECTIONS.** Except where specifically necessary, state only the legal ground for an objection. Objections designed primarily to make a speech, to display righteous indignation, to disparage the opponent, to get non-record facts before the jury, and the like, are particularly inappropriate.

Objections are addressed to the Court, not opposing counsel. Otherwise, an adverse ruling is nearly assured.

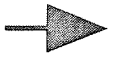
6. **EXAMINATION OF WITNESSES.** Do not ask witnesses to read out loud from exhibits that have already been admitted. If it is necessary to read such material aloud as a foundation for additional questions or for any other reason, counsel should do it and go on with the questioning.

Similarly, do not waste time by asking witnesses to make mathematical calculations where the answer is indisputable. For example, if it is necessary at that time to know the sum of a column of figures or the number of days between March 19 and February 23, state the number and go on with the questioning.

Do not make arguments in the guise of asking questions. Counsel should not ask a question which does not elicit testimony but which instead merely asks the witness to parrot an inference or conclusion that the examiner draws from the evidence or from general experience.

Remember that every examination after the cross-examination is limited to the scope of the prior examination. Valid objections to repetitious or extraneous questioning will be sustained.

It is not necessary to ask the court for permission to approach a witness.



7. **TRIAL DEPOSITIONS**. A deposition taken for the presentation of evidence at trial may not exceed 1-1/2 hours in length without the prior approval of the court.

8. **RECESSES.** Recesses are approximately 15 minutes in length, except where other court business requires a longer interval. The parties should not rely on court personnel to page them when sessions resume. In the case of prolonged absences the court may proceed with the parties or counsel who are present.

9. **JURY INSTRUCTIONS**. The heart of any jury instruction is the enumeration of the elements of the cause of action and any applicable affirmative defense. Where these are not supplied by the standard jury instructions, a request to charge should contain, at a minimum, a proposed impartial instruction on the elements of the cause of action.

Requests for standard jury instructions shall be identified by the number and name of the instruction. (Do not reproduce the text of the instruction.)

Where there are multiple pages of requests to charge, number the pages.

10. **STANDBY.** If the trial cannot start at the time assigned because another case is in progress, the action will remain subject to assignment for trial on one hour notice by telephone, but not later than 3:00 p.m. on Thursday of that week. If the action is not assigned by Thursday, at the option of either party the court will assign another trial date. MCR 2.503(E)(2).

Issued: _____

_____
William J. Giovan, Circuit Judge

02/05

**Supreme Court of Michigan**

Justine MALDONADO, Plaintiff-Appellee/Cross-Appellant,
v.
FORD MOTOR COMPANY, Defendant-Appellant/Cross-Appellee
and
Daniel P. BENNETT, Defendant.
476 Mich 372 (2006)
July 31, 2006.

**Background:** Employee brought action against employer, alleging sexual harassment by her supervisor. The Circuit Court, Wayne County, Kathleen Macdonald and William Giovan, JJ., excluded evidence of supervisor's prior conviction, but later dismissed case with prejudice based on misconduct of employee and counsel. Employee appealed, and the Court of Appeals affirmed in part, reversed in part, and remanded. Employer sought leave to appeal.

**Holdings:** The Supreme Court, Corrigan, J., held that:
(1) dismissal with prejudice was warranted due to employee's and counsel's publication of supervisor's excluded conviction, and
(2) dismissal due to employee's and counsel's publication of excluded conviction did not violate First Amendment.

Reversed.

Cavanagh, J., filed a dissenting opinion joined by Weaver and Kelly, JJ.

Weaver, J., filed a dissenting opinion joined by Kelly, J.

*****810*** Scheff & Washington, P.C. (by George B. Washington and Miranda K.S. Massie), Detroit, for the plaintiff.
Kienbaum Opperwall Hardy & Pelton, P.L.C. (by Elizabeth Hardy and Julia Turner Baumhart) (Patricia J. Boyle, of counsel), and Robert W. Powell, Birmingham, Birmingham, Dearborn, for Ford Motor Company.
Michael J. Steinberg, Kary L. Moss, and Christine Chabot, Detroit, for amicus curiae American Civil Liberties Union Fund of Michigan.

CORRIGAN, J.
****375*** In this case we consider the essential authority of trial courts to control the proceedings before them. The issue in this case pertains to the extent of a trial court's authority to govern the conduct of counsel and their clients in court proceedings. Where the Michigan Constitution authorizes us to make rules to govern court proceedings, the authority to enforce those rules inescapably follows. At the heart of preserving an organized polity, we must attend to relevant issues, including concerns over belligerent, antagonistic, or incompetent lawyering. To this end, we affirm the authority of trial courts to impose sanctions appropriate to contain and prevent abuses so as to ensure the orderly operation of justice.

****376*** We reiterate that trial courts possess the inherent authority to sanction litigants and their counsel, including the power to dismiss an action. *****811*** *Banta v. Serban*, 370 Mich. 367, 368, 121 N.W.2d 854 (1963); *Persichini v. Beaumont Hosp.*, 238 Mich.App. 626, 639-640, 607 N.W.2d 100 (1999); *Prince v. MacDonald*, 237 Mich.App. 186, 189, 602 N.W.2d 834 (1999). This power is not governed so much by rule or statute, but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of

cases. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991).

We further acknowledge that our trial courts also have express authority to direct and control the proceedings before them. MCL 600.611 provides that "[c]ircuit courts have jurisdiction and power to make any order proper to fully effectuate the circuit courts' jurisdiction and judgments." Additionally, MCR 2.504(B)(1) provides that "[i]f the plaintiff fails to comply with these rules or a court order, a defendant may move for dismissal of an action or a claim against that defendant."

In the instant case, we consider whether the trial court abused its discretion in dismissing plaintiff's case because plaintiff and her attorneys repeatedly and intentionally publicized inadmissible evidence so as to taint the potential jury pool, deny defendants a fair trial, and frustrate the due administration of justice. We conclude that because the trial court possessed the inherent authority to dismiss the action, and because the trial court warned plaintiff and her counsel that dismissal would result if they continued to publicize evidence ruled inadmissible by court order, the trial court did not abuse its discretion in dismissing plaintiff's case.

***377** We also consider whether the trial court's dismissal of plaintiff's case because plaintiff intentionally disobeyed its explicit warning to refrain from publicizing information regarding defendant Daniel P. Bennett's excluded conviction violated the First Amendment. The trial court's limitation on the speech of plaintiff and her counsel was a narrow and necessary limitation aimed at protecting potential jurors from prejudice. See *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991). The trial court's narrow restriction on speech did not offend the First Amendment. The Court of Appeals novel requirement that dismissal is improper unless the jury pool was actually tainted conflicts with the substantial likelihood of prejudice test of *Gentile.* Moreover, "actual taint" is an impossible and unworkable standard, especially where nearly three years have passed since the incidents occurred. Accordingly, we reverse the judgment of the Court of Appeals and reinstate the trial court's order dismissing plaintiff's complaint.

## I. UNDERLYING FACTS AND PROCEDURAL HISTORY

Plaintiff Justine Maldonado, an employee of defendant Ford Motor Company, filed suit against Ford, alleging that a Ford supervisor, Daniel Bennett, sexually harassed her in violation of the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq.*[FN1] Ford (hereafter defendant) moved in limine to exclude evidence of Bennett's 1995 indecent exposure conviction. Judge Kathleen Macdonald, the original judge assigned to the case, granted defendant's motion and entered an order ***378** on February 16, 2001, excluding evidence of Bennett's prior conviction in this case and in another action brought against Bennett, ***812** *Elezovic v. Ford Motor Co.*, 472 Mich. 408, 697 N.W.2d 851 (2005).[FN2] Plaintiff thereafter sought leave to appeal to the Court of Appeals and this Court regarding Judge Macdonald's decision to exclude Bennett's prior conviction. Both the Court of Appeals and this Court denied plaintiff's application.[FN3]

FN1. We have previously considered other actions in which Daniel Bennett was accused of sexual harassment, *Elezovic v. Ford Motor Co.*, 472 Mich. 408, 697 N.W.2d 851 (2005), and *McClements v. Ford Motor Co.*, 473 Mich. 373, 702 N.W.2d 166 (2005), mod 474 Mich. 1201, 704 N.W.2d 68 (2005).

FN2. In the *Elezovic* case, Judge Macdonald also issued an order directing that witnesses be instructed that reference to Bennett's excluded conviction or any other excluded evidence would be considered a contempt of court, and would result in sanctions, including compensation to the court in the case of a mistrial. All the witnesses in that case, including plaintiff Justine Maldonado, signed

statements indicating that they had been advised of the court's ruling regarding inadmissible evidence, that they were not to mention any excluded evidence, and that they understood that sanctions would result from mentioning any excluded evidence.

As Justice Cavanagh notes, Judge Macdonald stated, upon entering the order of exclusion, that she might reconsider her decision to exclude the evidence during the course of the trial if need be. Justice Cavanagh, however, erroneously relies on this statement to conclude that plaintiff and her counsel were not precluded from "ever mentioning the indecent exposure conviction in public again ...." *Post* at 828 (emphasis omitted). Judge Macdonald's order remained in effect throughout this case. As such, plaintiff and her counsel were bound by the order.

FN3. 465 Mich. 971, 642 N.W.2d 679 (2002).

On September 11, 2001, less than a month before a settlement conference scheduled for October 3, 2001, and shortly after a three-week trial resulting in a directed verdict for defendants in the *Elezovic* case, plaintiff's counsel issued a press release on firm letterhead that referred to Bennett's indecent exposure conviction, Judge Macdonald's exclusion of that conviction as evidence, and the impending trial in this case.[FN4] A ***379** series of news broadcasts and print media publications followed, replete with references to Bennett's prior conviction.[FN5]

FN4. Justice Weaver claims that plaintiff only, and not her counsel, made public statements about the excluded conviction after Judge Macdonald entered the order of exclusion. The September 11 press release, however, which referred to the excluded conviction, was issued by plaintiff's counsel after the order of exclusion was entered.

FN5. The following is a list of the publications stemming from plaintiff's counsel's September 11, 2001, press release, many of which refer to Bennett's excluded conviction: (1) The Associated Press wire story, September 12, 2001, referencing the excluded conviction; (2) an article in the *Detroit Free Press,* September 13, 2001, referencing the excluded conviction; (3) an article by the United Press International, October 10, 2001, referencing the excluded conviction; (4) The Associated Press wire story, October 10, 2001, referencing the excluded conviction; (5) a Fox 2 news broadcast held at the law office of Scheff and Washington, October 10, 2001, referencing the excluded conviction and providing a closeup of the conviction papers; (6) a WDIV news broadcast, October 10, 2001, referencing the excluded propensity evidence; and (7) an article in the *Oakland Press,* October 11, 2001, referencing the excluded conviction.

Justice Weaver contends that we assert that plaintiff's counsel referred to the excluded conviction in these publications. We assert no such thing. Rather, we merely state that these publications stem from plaintiff's counsel's September 11, 2001, press release. In other words, it was plaintiff's counsel's press release that prompted the mass of publications. Plaintiff's counsel's press release was designed to draw media attention to the excluded conviction and, as shown above, indeed accomplished its goal.

On November 9, 2001, Bennett's indecent exposure conviction was expunged in district court proceedings.

By order dated January 11, 2002, Judge Macdonald established a trial date of July 8, 2002.

In February 2002, Judge Macdonald was assigned to the family division of the circuit court. Consequently, this case was reassigned by lot to Judge William Giovan. ***813** On May 17, 2002, Judge Giovan held a hearing regarding the admissibility of propensity evidence not currently at issue. Plaintiff's counsel invited the media to this hearing. Despite Judge Giovan's order closing the hearing to the media, plaintiff's counsel directed the ***380** media to wait outside until the hearing concluded to discuss details regarding the hearing.

Immediately following the hearing, Judge Giovan met with all counsel to discuss plaintiff's counsel's continued public references to Bennett's prior conviction despite Judge Macdonald's previous court order and the expungement of the conviction. Bennett's counsel pointed out that plaintiff's counsel's behavior apparently violated MCL 780.623(5),[FN6] which criminalizes the divulgence, use, or publication of information regarding an expunged conviction. Plaintiff's counsel responded by stating that "it was worth the risk" to continue to publicize Bennett's expunged conviction.[FN7]

> FN6. The expungement statute states:
>
> Except as provided in subsection (2), a person, other than the applicant, who knows or should have known that a conviction was set aside under this section and who divulges, uses, or publishes information concerning a conviction set aside under this section is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $500.00, or both. [MCL 780.623(5).]

> FN7. Plaintiff's counsel's comments at this meeting also demonstrate that plaintiff's counsel continued to make public references to the excluded evidence despite the court order, contrary to Justice Weaver's contention.

Judge Giovan declined to order plaintiff's counsel to obey MCL 780.623(5) because he considered it redundant to order an attorney to follow the law.[FN8] Despite ***381** Judge Giovan's expression of confidence that counsel would follow the law, plaintiff's counsel left the courtroom and met with the waiting media. This meeting resulted in extensive television news and press coverage, some of which again referred to Bennett's expunged conviction and the possible exclusion of the propensity evidence.[FN9] Shortly thereafter, plaintiff's counsel again discussed this case at a May 28 public meeting and a June 1, 2002, rally in Ann Arbor sponsored by BAMN (Coalition to Defend Affirmative Action, Integration & Immigrant Rights and Fight for Equality by any Means Necessary).[FN10]

> FN8. Justice Cavanagh mischaracterizes Judge Giovan's refusal to unnecessarily order an attorney to follow the law as a refusal to require the parties to refrain from referencing the excluded evidence. Justice Cavanagh's mischaracterization that "the trial court never thought it issued an order" in this case is preposterous. *Post* at 17. While Judge Giovan did not specifically enter a gag order, he did, on numerous occasions, direct the parties to abide by Judge Macdonald's order of exclusion, he subsequently denied plaintiff's motion to dissolve the order, and he orally warned the parties that dismissal would result for failure to abide by the order. Moreover, Justice Cavanagh's mischaracterization of the lower court transcript is rebutted by plaintiff's own comment, "If we don't act the way he [Judge Giovan] wants it, the way he sees fit, then he'll dismiss my case with prejudice."

> FN9. The following is a list of the publications stemming from plaintiff's counsel's May 17, 2002, meeting with the media, some of which also referred to evidence that had been excluded before trial: (1) a WDIV news broadcast, May 17, 2002, referencing the excluded propensity evidence; (2) a WXYZ news broadcast, May 17, 2002, also referencing the excluded propensity evidence;

and (3) The Associated Press local wire story, May 17, 2002, referencing the expunged conviction.

Again, contrary to Justice Weaver's contention, we do not assert that plaintiff's counsel actually made references to the excluded evidence in these publications. Rather, we assert that these publications stem from plaintiff's counsel's meeting with the media.

FN10. Plaintiff's counsel, George Washington, Miranda Massie, and Jodi Masley, are all members of the BAMN organization.

***814** Plaintiff subsequently moved to dissolve Judge Macdonald's order excluding Bennett's prior conviction from evidence. On June 13 and 21, 2002, Judge Giovan heard the motion. During that hearing, plaintiff's counsel mentioned that an article had been published in the June 12-18, 2002, issue of the *Metro-Times,* a free weekly publication readily available in the courthouse where jury selection was imminent. The article appeared on the front page of the newspaper and referenced***382** Bennett's expunged conviction. This article prompted the following colloquy:

*The Court:* But, you know, since you mentioned the article, where's this coming from? I thought that there is a prohibition against counsel speaking to-making public statements designed to affect trial.

*Ms. Hardy* [defense counsel]: There certainly is. There's an ethics rule which prohibits counsel from intentionally trying to taint a jury pool by making the public aware of excluded evidence, which is exactly what's been occurring for quite some time.

*The Court:* Is counsel being quoted in this?

*Mr. Washington* [plaintiff's counsel]: I think counsel on both sides. Ford was not, but Mr. Morgan and Ms. Massie and I were both quoted, all quoted.

*The Court: I'm* not sure-well-

*Ms. Hardy:* It was initiated, without a doubt, and Mr. Washington will not dispute this, by Mr. Washington, as all the press has been initiated by his office, and the constant publicity is one issue, but *the really serious issue is the effort by Mr. Washington to make sure that the press continues to report evidence or information concerning this expunged conviction so that some way, somehow, irrespective of this Court's ruling-* FN11

FN11. Although the article contained quotations from both plaintiff's counsel and defense counsel, defendant claimed that plaintiff's attorney provided the reporter with the extensive information in the article regarding Bennett's excluded conviction. Plaintiff did not deny this allegation.

Justice Cavanagh contends that because Bennett's counsel, on two occasions, referred publicly to Bennett's excluded conviction, plaintiff should not be punished for behaving as defense counsel did. We acknowledge that Bennett's counsel publicly referred to Bennett's excluded conviction. We disagree, however, that defense counsel's behavior mirrored that of plaintiff and her counsel. Bennett's counsel's limited references to the excluded evidence were prompted by plaintiff and her counsel. Defense counsel's statements were made in an attempt to minimize the damage caused by plaintiff's and her counsel's numerous public references to the excluded evidence. Unlike plaintiff's and her counsel's public comments regarding the excluded evidence, defense counsel's comments were not intended to taint the potential jury pool and cause prejudice to plaintiff.

*383 *The Court:* I'm not making any decisions about this, but I'm going to tell you one thing. *If I ever reach the conclusion that somebody is violating that ethical obligation and causing some difficulty in our getting a fair jury, I will dismiss the case with prejudice,* or, and I should say, on the other side, grant a default judgment. I just want everyone to know that. And then whatever counsel is involved can answer to their client. [Emphasis added.]

The court denied the motion to dissolve Judge Macdonald's previous order of exclusion.

Three days later, on June 24, 2002, plaintiff was deposed, at which time she admitted that she had disclosed facts regarding Bennett's expunged conviction despite the trial court's order disallowing such evidence. The following colloquy took place:

**815 [ *Defense counsel* ]: If you can give me a ballpark figure, how many times since you found out about the expungement have you told other people about the fact that Mr. Bennett had this conviction that was later expunged?

[ *Plaintiff's counsel* ]: You mean at people, period, one person at a time?

[ *Defense counsel* ]: Any individual, whether it's groups, how many times has she gone out and publicized it, divulged it.

[ *Plaintiff* ]: I have no idea. It's been a lot.

*Q:* Over 100?

*A:* I don't know.

*Q:* Over ten?

*A:* Oh, definitely over ten, possibly over 100.

*Q:* Okay.

*A:* If I could get it out on the Internet, I would put it out on the Internet.

*384 Moreover, plaintiff admitted during her deposition on June 24, 2002, that she would continue to disclose facts regarding Bennett's expunged conviction. She stated:

*A:* I'm aware that you're whining and crying because I'm talking about it all over town, yes, I am aware of that. I won't shut up about it. It's the truth. You can expunge it, but it's the truth, and I'm going to tell it, and you know what? I will tell anybody that will listen because this man is a menace and he must be stopped, and you know it and you know it [sic]. But you guys want to protect him, that's fine, I'm not. I don't have to protect Mr. Bennett.

*Q:* So you've been talking about it-

*A:* To anyone.

*Q:* -any chance you get, to anyone-

*A:* That's Right.

*Q:* -even though-even since you became aware that it was expunged?

*A:* Yes. Absolutely.

On June 26, 2002, two days after the deposition, plaintiff and certain of her counsel participated in a “Justice for Justine Committee” demonstration outside Ford headquarters. During the demonstration, participants distributed leaflets to the public containing information regarding Bennett's expunged conviction and evidence regarding Bennett's alleged behavior toward other female Ford employees that the trial court had ruled inadmissible. The leaflet also stated that Judge Giovan “is in Ford's pocket” and “is trying to keep the truth out of the courtroom.” Also on this day, a television interview was broadcast on WDIV Channel 4, in which plaintiff stated:

If we don't act the way he [Judge Giovan] wants it, the way he sees fit, then he'll dismiss my case with prejudice. And what he doesn't know is, it doesn't bother me, because I'm not going to quit fighting against sexual harassment.

***385** A demonstration similar to that held on June 26, 2002, was held the following day at the Ford Wixom plant, at which a similar leaflet was distributed.[FN12]

> FN12. The following publications stemmed from the June 26 and 27 demonstrations: (1) a WDIV news broadcast, June 26, 2002, showing picketers holding signs stating, “Ford, stop buying judges”; (2) a Click on Detroit, Channel 4 website article, June 26, 2002, referencing the exclusion of the propensity evidence; and (3) an article in the *Detroit News,* June 27, 2002.

On June 28, 2002, defendants moved to dismiss plaintiff's suit on the basis that plaintiff and her counsel engaged in improper pretrial publicity aimed at tainting the potential jury pool. On July 1, 2002, plaintiff responded by moving to disqualify Judge Giovan. On July 3, 2002, Judge ***816** Giovan heard and denied this motion. The same day, plaintiff's counsel, Miranda Massie, appeared in a television interview broadcast on WDIV, Channel 4. She stated:

Metro Detroit has a company town feeling, and it's hard to get a fair hearing from any of these judges when you're going against the Ford Motor Company. They'll stop at nothing to maintain the culture of abuse that exists in those plants, and we've found it hard to get unbiased judicial rulings in these cases.[FN13]

> FN13. As a result of this news broadcast, the following publications were released: (1) a Click on Detroit, Channel 4 website article, July 3, 2002, referencing plaintiff's and her counsel's belief that Judge Giovan was biased; and (2) a Channel 50 news broadcast, July 3, 2002, in which plaintiff stated that money cannot buy justice.

On July 8, 2002, the date on which jury selection was to begin, Judge Timothy Kenny heard plaintiff's appeal of Judge Giovan's denial of the motion for his disqualification and affirmed the denial. Also on July 8, 2002, Judge Giovan heard defendant's motion to dismiss.[FN14] Throughout the hearing, plaintiff and her counsel were ***386** discourteous to and uncooperative with the court. Specifically, in response to the court's question, “Are you a member of the ‘Justice for Justine’ committee?” plaintiff's counsel, Jodi Masley, responded by stating:

> FN14. Also on this day, an article was published on the Click on Detroit, Channel 4 website concerning Judge Giovan's alleged bias.

Nobody's ever asked me that in my life. I-you know what. I fully support the “Justice for Justine”, you know, committee. They have every right to do everything they [want]. And did I participate in a demonstration that was called by the “Justice for Justine” committee, I did.

Judge Giovan attempted to respond to Ms. Masley's comment, but she interrupted him, stating, “I mean, have I or have I ever been a member of the Communist Party, is that what this is?” Moreover, in response to Judge Giovan's inquiry regarding whether members of the

"Justice for Justine" committee were present in the court, Ms. Masley stated:

Have you guys even ever heard of the phrase "Freedom of association ... ?"

* * *

I have no idea. Do they need to know-identify their political affiliations ... ?

* * *

(Interposing) Who did you guys vote for in the last judicial election?

The hearing continued into the following day. At the conclusion of the two-day hearing, plaintiff requested permission to file a supplemental brief, which Judge Giovan granted.

On August 21, 2002, Judge Giovan issued an opinion and order dismissing plaintiff's case with prejudice, concluding that plaintiff and her counsel had engaged in premeditated misconduct designed to tamper with ***387** the administration of justice and that no lesser sanction would deter plaintiff or her counsel.[FN15]

> FN15. Justice Weaver contends that Judge Giovan improperly attributed responsibility for plaintiff's improper references to plaintiff's counsel. As these facts clearly demonstrate, however, Judge Giovan properly determined that both plaintiff and her counsel engaged in behavior designed to taint the potential jury pool.
>
> Justice Weaver further contends that plaintiff was not restricted by any order or court rule from making repeated public references to Bennett's prior conviction. While we disagree with the contention that no order or court rule barred plaintiff from making public references to the excluded evidence, we reiterate that, whether a court order existed or whether a court rule applied, plaintiff was not free to repeatedly publicize excluded evidence, especially with the trial impending. The only conclusion that can logically be drawn from plaintiff's repeated references to the excluded conviction is that plaintiff was improperly attempting to admit the excluded evidence by means of the mass media. Consequentially, Judge Giovan chose a principled option within his authority in dismissing plaintiff's case in order to protect the administration of justice. *Banta, supra* at 368, 121 N.W.2d 854; *Cummings v. Wayne Co.*, 210 Mich.App. 249, 252, 533 N.W.2d 13 (1995), citing *Buchanan Home & Auto Supply Co. v. Firestone Tire & Rubber Co.*, 544 F.Supp. 242, 244-245 (D.S.C., 1981).

****817** The Court of Appeals, affirmed in part, reversed in part, and acknowledged the trial court's authority to dismiss plaintiff's complaint, but remanded the case to the trial court to hold an evidentiary hearing to determine whether plaintiff's and her counsel's comments actually prejudiced the jury pool.[FN16]

> FN16. Unpublished opinion per curiam of the Court of Appeals, issued April 22, 2004, 2004 WL 868657 (Docket No. 243763).

Defendant sought leave to appeal to this Court. We directed the clerk to schedule oral argument on whether to grant the application or to take other peremptory action.[FN17]

> FN17. 471 Mich. 940, 690 N.W.2d 101 (2004).

## II. STANDARD OF REVIEW

This case requires us to determine whether the Court *388 of Appeals erred in reversing the trial court's dismissal of this case. Trial courts possess the inherent authority to sanction litigants and their counsel, including the right to dismiss an action. *Banta, supra* at 368, 121 N.W.2d 854. "An exercise of the court's 'inherent power' may be disturbed only upon a finding that there has been a clear abuse of discretion." *Brenner v. Kolk*, 226 Mich.App. 149, 160, 573 N.W.2d 65 (1997). A trial court's dismissal of a case for failure to comply with the court's orders is also reviewed for an abuse of discretion. *Thorne v. Carter*, 149 Mich.App. 90, 93, 385 N.W.2d 738 (1986); MCR 2.504(B)(1).

In *People v. Babcock*, 469 Mich. 247, 269, 666 N.W.2d 231 (2003), this Court noted that an abuse of discretion standard must be one that is more deferential than review de novo, but less deferential than the standard set forth in *Spalding v. Spalding*, 355 Mich. 382, 94 N.W.2d 810 (1959). This Court stated that "an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *Babcock, supra* at 269, 666 N.W.2d 231. The *Babcock* Court further noted that "[w]hen the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." *Id.* While *Babcock* dealt with a criminal sentencing issue, we prefer the articulation of the abuse of discretion standard in *Babcock* to the *Spalding* test and, thus, adopt it as the default abuse of discretion standard.

Additionally, in cases raising First Amendment issues, an appellate court is obligated to independently review the entire record to ensure that the lower court's judgment "does not constitute a forbidden intrusion *389 of the field of free expression." *Gentile, supra* at 1038, 111 S.Ct. 2720 quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984), quoting **818 *New York Times Co. v. Sullivan*, 376 U.S. 254, 258, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

## III. ANALYSIS

### A. Trial Court's Authority to Sanction Litigants for Unethical Behavior

As stated above, trial courts possess the inherent authority to sanction litigants and their counsel, including the power to dismiss an action. *Banta, supra* at 368, 121 N.W.2d 854. "The authority to dismiss a lawsuit for litigant misconduct is a creature of the 'clean hands doctrine' and, despite its origins, is applicable to both equitable and legal damages claims." *Cummings v. Wayne Co.*, 210 Mich.App. 249, 252, 533 N.W.2d 13 (1995), citing *Buchanan Home & Auto Supply Co. v. Firestone Tire & Rubber Co.*, 544 F.Supp. 242, 244-245 (D.S.C., 1981). "The authority is rooted in a court's fundamental interest in protecting its own integrity and that of the judicial process." *Cummings, supra* at 252, 533 N.W.2d 13. "The 'clean hands doctrine' applies not only for the protection of the parties but also for the protection of the court." *Id.*, citing *Buchanan Home, supra* at 244.

Moreover, the Michigan Constitution confers on the judicial department all the authority necessary to exercise its powers as a coordinate branch of government. "Const. 1963, art. 3, § 2 divides the powers of government among three branches and commits to each branch exclusive exercise of the functions properly belonging to it, except as otherwise expressly provided in the Constitution." [FN18] *390 *In re 1976 PA 267*, 400 Mich. 660, 662, 255 N.W.2d 635 (1977). "Art. 6, § 1 vests the judicial power of the state exclusively in one court of justice." [FN19] *Id.* "Section 4 of that article [FN20] vests general superintending control over all courts in the state in the Supreme Court and § 5 confers upon this Court the power to make rules to govern the practice and procedure within the courts." [FN21] *Id.* "It is also well settled

that under our form of government the Constitution confers on the judicial department all the authority necessary to exercise its powers as a coordinate branch of government." *Id.* at 662-663, 255 N.W.2d 635. "The judicial powers derived from the Constitution include rulemaking, supervisory ***391** and other administrative powers as well as traditional adjudicative ones." *Id.* at 663, 255 N.W.2d 635. "They have been exclusively entrusted to the judiciary by the Constitution and may not be diminished,***819** exercised by, nor interfered with by the other branches of government without constitutional authorization." *Id.,* citing *Attorney General ex rel., Cook v. O'Neill,* 280 Mich. 649, 274 N.W. 445 (1937).

> FN18. Const. 1963, art. 3, § 2 provides:
>
> The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in the constitution.
>
> FN19. Const. 1963, art. 6, § 1 provides:
>
> The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house.
>
> FN20. Const. 1964, art. 6, § 4 provides:
>
> The supreme court shall have general superintending control over all courts; power to issue, hear and determine prerogative and remedial writs; and appellate jurisdiction as provided by rules of the supreme court. The supreme court shall not have the power to remove a judge.
>
> FN21. Const. 1964, art. 6, § 5 provides:
>
> The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state. The distinctions between law and equity proceedings shall, as far as practicable, be abolished. The office of master in chancery is prohibited.

Moreover, express authority to dismiss a complaint is conferred by statute and court rule in Michigan. MCL 600.611 provides that "[c]ircuit courts have jurisdiction and power to make any order proper to fully effectuate the circuit courts' jurisdiction and judgments." Additionally, MCR 2.504(B)(1) provides that "[i]f the plaintiff fails to comply with [the court] rules or a court order, a defendant may move for dismissal of an action or a claim against that defendant."

Several of the Michigan Rules of Professional Conduct address sanctionable attorney conduct. MRPC 3.6 concerns trial publicity. It provides:

A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the *lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.* [Emphasis added.]

MRPC 3.5 addresses impartiality and decorum of the tribunal. It states:

A lawyer shall not:

(a) *seek to influence a* judge, juror, *prospective juror* or other official *by means prohibited by law;*

(b) communicate ex parte with such a person concerning a pending matter except as permitted by law; or

(c) engage in undignified or discourteous conduct toward the tribunal. [Emphasis added.]

**392* Finally, MRPC 8.4 deals with attorney misconduct. It provides, in relevant part:

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;

(c) engage in conduct that is prejudicial to the administration of justice.

B The Trial Court's Authority to Dismiss this Case

In this case, Judge Macdonald initially concluded that evidence of Bennett's prior conviction was inadmissible before the jury because of its unduly prejudicial nature. Rather than abiding by the trial court's order, even after both the Court of Appeals and this Court denied plaintiff leave to appeal regarding the order, plaintiff and her counsel engaged in a concerted and wide-ranging campaign in the weeks before various scheduled trial dates to publicize the details of the inadmissible evidence through the mass media and other available means. They continued to do so even after the trial court explicitly warned them that such misconduct would result in the dismissal of plaintiff's lawsuit.

The trial court has a gate-keeping obligation, when such misconduct occurs, to impose sanctions that will not only deter the misconduct but also serve as a deterrent to other litigants.

Moreover, MCL 600.611 and MCR 2.504(B)(1) provide the trial court with the authority to impose sanctions**393* such as dismissal. Here, Judge Macdonald issued an order excluding evidence regarding Bennett's expunged conviction. Judge ***820* Giovan later reaffirmed Judge Macdonald's initial order of exclusion, and explicitly warned the parties that he would dismiss the case if the inappropriate remarks regarding the excluded conviction continued. FN22

> FN22. Both Justice Cavanagh and Justice Weaver claim that Judge Giovan's warning to refrain from engaging in pretrial publicity was not an order of the court. In doing so, they rely on Judge Giovan's statement that he "never issued a gag order" in this case. The dissenting justices, however, take this statement out of context. Judge Giovan clearly explained that a gag order was not necessary because rules were already in place governing pretrial publicity:
>
> So, what I say, I'm not going to issue a gag order because the rules of professional conduct already have a standard that bind you. So, why should Judge Giovan, who is only one of thousands of judges, select his own criteria for what people should say when we have standing rules that govern what attorneys are permitted to say?
>
> And one of the things that attorneys are not permitted to do is to make public

statements that are intended to influence the outcome of a case. And when your opponents after several times coming to court accusing you and your colleagues and maybe the parties themselves of doing precisely that, I took no action.

But after-on the day that this did occur, I had seen a long article about this case, I had heard counsel say on many occasions, as you have said here today, that you have invited public examination of this case, all I said was that if I should find that the rules were violated, I would take corrective action, which could include dismissing the case.

Now, I was not referring to some mysterious, illusory, ambiguous rule fixed in my mind and known to nobody else. It's obvious I was not saying that, that I was going to take action or not based on a rule that I invented and disclosed to no one.

What was obvious to anyone that what I was saying is that if I found that the rule of professional conduct was violated, that is to say that counsel or parties were making public statements intended to affect the outcome of this case, I would take action.

***394** Plaintiff's understanding of Judge Macdonald's order and Judge Giovan's warning to adhere to the order was clearly demonstrated in her deposition and in the June 26, 2002, television interview that was broadcast on WDIV Channel 4 in which she acknowledged Judge Giovan's warning that dismissal would result if she continued her behavior, but further stated that "it doesn't bother me, because I'm not going to quit fighting against sexual harassment."

Plaintiff's counsel also clearly understood Judge Macdonald's order and Judge Giovan's explicit warning to adhere to the order. The trial court twice explicitly discussed the improper conduct with plaintiff's counsel and warned everyone about the consequences of continuing misconduct. Despite the warning, and despite the approaching trial, plaintiff and her counsel continued the misconduct.[FN23] In ***821** fact, as Judge Giovan noted, ***395** plaintiff's lead counsel, George Washington and Miranda Massie, appeared in television news broadcasts that specifically referred to Bennett's expunged conviction. Moreover, plaintiff's counsel acknowledged that counsel could possibly be violating the expungement statute by publicly disseminating information regarding Bennett's expunged conviction, but stated that it was "worth the risk." Also of note is Ms. Masley's statement at the July 8, 2002, hearing that "Ms. Maldonado has a right to speak about Mr. Bennett's conviction for sure." She further stated that plaintiff and her counsel, depending on how close it was to trial, had the right to publicize evidence that had been excluded by the court.

FN23. Justice Cavanagh suggests that Judge Giovan's warning not to discuss the excluded conviction with the press was somehow insufficient to convey to the parties that they were not to discuss the excluded conviction with the media. *Post* at 828-830. We strongly disagree. The transcript of this exchange, which we have set forth on pages 9 to 11 of this opinion, makes it quite clear that the parties were advised in no uncertain terms that references to the excluded conviction were to cease. Contrary to Justice Cavanagh's assertion, Judge Giovan explicitly warned the parties and the attorneys that further references to the excluded conviction would result in dismissal. Although Judge Giovan did not embody this warning in a written order, the warning did not consist of "general comments ... made in passing to both parties." *Post* at 831. Rather, the warning was explicit and made on the record in open court. All involved were clearly aware of what was prohibited. To require a formal written order-as it appears Justice Cavanagh would-would be to permit any litigant or attorney to disregard an explicitly conveyed and clearly understood obligation on the ground that it was not communicated in a written order. Such a rule would lead only to gamesmanship and we decline to adopt it.

Plaintiff was well aware of Judge Giovan's explicit warning to refrain from making public references to the excluded conviction and of the consequences of failing to abide by the

warning. Moreover, as demonstrated throughout this opinion, plaintiff failed to abide by the warning on numerous occasions.

Judge Giovan properly noted that, notwithstanding the rulings of two judges and the apparent illegality of disclosing Bennett's excluded conviction, nothing would deter plaintiff from continuing to publicize information regarding Bennett's excluded conviction. Plaintiff so admitted in her deposition. Even without an explicit order precluding plaintiff and her counsel from publicizing Bennett's excluded conviction, Judge Giovan chose a principled option in dismissing plaintiff's case in order to protect the administration of justice. The imposition of any lesser sanction would have been unjust in light of plaintiff's and her counsel's flagrant misbehavior. [FN24]

FN24. Justice Cavanagh suggests that the trial court had "numerous other options" available to it as sanctions apart from dismissal. *Post* at 833. Even if we agreed with this assertion, it is irrelevant in determining whether the sanction actually chosen-dismissal in this case-was within the range of "reasonable and principled outcome[s]." *Babcock, supra* at 269, 666 N.W.2d 231. In light of the repeated violation of the court's instruction not to publicize the excluded conviction, we cannot say that Judge Giovan's conclusion that nothing short of dismissal would deter plaintiff's and her counsel's repeated misconduct was incorrect. As such, even if we were to assume that there were other sanctions available-which we do not necessarily believe to be the case-the sanction of dismissal was clearly within the range of reasonableness under the circumstances.

***396** Not only did plaintiff and her counsel disregard Judge Macdonald's order and Judge Giovan's explicit warning to respect the order, counsel violated numerous rules of professional conduct. Plaintiff's counsel's public references to Bennett's excluded conviction violated MRPC 3.6, which was the basis for Judge Giovan's dismissal. Plaintiff's counsel reasonably knew or should have known that their comments would have a substantial likelihood of materially prejudicing the proceedings by improperly influencing prospective jurors regarding Bennett's propensities to commit sexual harassment, especially since trial was approximately two weeks away.

Plaintiff argues that Judge Giovan improperly relied on MRPC 3.6 in dismissing plaintiff's case. She contends that Judge Giovan's dismissal was solely based on plaintiff's comments, and that MRPC 3.6 does not apply to nonlawyers. Plaintiff correctly argues that the Michigan Rules of Professional Conduct do not apply to nonlawyers, but mistakenly contends that Judge Giovan relied only on her behavior in ordering a dismissal. Plaintiff also erroneously contends that she is free to engage in improper pretrial publicity designed to taint the potential jury pool. The Michigan Court Rules do apply to plaintiff. They authorize the trial court to impose sanctions such as dismissal for party misconduct. MCR 2.504(B)(1). Judge ***822** Giovan expressly warned plaintiff that if she continued to disseminate information***397** regarding Bennett's excluded conviction in violation of Judge Macdonald's order, he would dismiss her case. Plaintiff failed to obey this warning and, thus, Judge Giovan properly dismissed her case.[FN25] In any event, even if plaintiff is not bound by MRPC 3.6, plaintiff's counsel's repeated public references to Bennett's excluded conviction, coupled with Ms. Massie's statement five days before trial that "Metro Detroit" judges were biased in favor of the Ford Motor Company, were substantially likely to materially prejudice the proceedings and improperly influence prospective jurors.

FN25. Justice Cavanagh contends that we attempt to portray Judge Macdonald's order excluding Bennett's prior conviction as having the same effect as an order precluding any mention of this evidence in public. We, however, do not misconstrue the order of exclusion as an order precluding any mention of the evidence in public. Rather, we rely on the order of exclusion in concluding that plaintiff's and her counsel's numerous

> references to the excluded evidence just weeks before trial was to begin constituted premeditated misconduct designed to taint the potential jury pool, deny defendants a fair trial, and frustrate the due administration of justice.

Judge Giovan did not reach a conclusion regarding a possible violation of MRPC 3.5, finding it was unnecessary because he dismissed the case under MRPC 3.6. Because Judge Giovan did not rely on this rule in dismissing the case, we need not reach a conclusion regarding a possible violation of the rule. We nevertheless enumerate plaintiff's counsel's acts of disrespect against the trial court to highlight plaintiff's counsel's undignified and discourteous conduct toward the trial court.

Plaintiff's counsel, on numerous occasions, despite court orders and an explicit warning by the trial court, publicly divulged information regarding Bennett's excluded conviction. Plaintiff's counsel also deliberately disregarded the trial court's oral directive to refrain from ***398** disseminating information regarding Bennett's excluded conviction. Ms. Masley sarcastically responded to the trial court's questioning at the dismissal hearing, and at one point, while on the stand, turned to members of the "Justice for Justine" committee present in the courtroom and asked them who they voted for in the last judicial election. Additionally, Ms. Massie commented during a July 3, 2002, television interview that "Metro Detroit" judges are biased toward the Ford Motor Company. While this conduct may not amount to a violation of MRPC 3.5, it further justifies Judge Giovan's dismissal for plaintiff's and her counsel's participation in pretrial publicity designed to taint the jury pool.

We also note MRPC 8.4, although Judge Giovan did not rely on this rule in ordering dismissal. MRPC 8.4 prohibits lawyers from engaging in conduct that is prejudicial to the administration of justice. MRPC 8.4(a) prohibits lawyers from engaging in misconduct through the acts of others. Here, plaintiff's counsel not only failed to restrain plaintiff from repeatedly and intentionally publicizing Bennett's inadmissible expunged conviction in order to taint the potential jury pool and deny defendants a fair trial, they participated with plaintiff in the misconduct on numerous occasions. This inappropriate and unprofessional conduct directly violated Judge Macdonald's order, Judge Giovan's reaffirmance of the order, and Judge Giovan's explicit warning. Moreover, this conduct was directly aimed at frustrating the due administration of justice. It also supports the dismissal of plaintiff's complaint.

### C. The First Amendment and a Trial Court's Ability to Restrict Speech

The First Amendment guarantees that the freedom of speech shall not be abridged. It states:

***823 *399** Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. [U.S. Const., Am. I.]

In *Gentile,* the United States Supreme Court addressed the standard governing the state's ability to discipline an attorney under an ethical rule that is identical in all relevant respects to MRPC 3.6, regarding speech about parties or proceedings in which an attorney is involved. The Court rejected the petitioner attorney's claim that he should be held to the "clear and present danger" standard applicable to the press, and concluded that "the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press." *Gentile, supra* at 1074, 111 S.Ct. 2720. The Court, in an opinion by Chief Justice Rehnquist, explained:

We agree with the majority of the States that the "substantial likelihood of material prejudice" standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials.

When a state regulation implicates First Amendment rights, the Court must balance those interests against the State's legitimate interest in regulating the activity in question. The "substantial likelihood" test ... is constitutional ... for it is designed to protect the integrity and fairness of a state's judicial system and it imposes only narrow and necessary limitations on lawyers' speech. The limitations are aimed at two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) *comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found.* [ *Id.* at 1075, 111 S.Ct. 2720 (emphasis added).]

The Court noted that "[l]awyers representing clients in pending cases are key participants in the criminal ***400** justice system, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct." *Id.* at 1074, 111 S.Ct. 2720. The Court further observed that "[f]ew, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right." *Id.* at 1075, 111 S.Ct. 2720.

Judge Giovan, after reviewing *Gentile,* found a substantial likelihood of prejudice:

More important, however, is that the plaintiff should not be heard to make her argument, which goes like this: "We deny that our behavior was intended to have a substantial likelihood of prejudice. But even if you establish that it was, you cannot dismiss the plaintiff's case until you establish that it has achieved its intended effect."

We believe otherwise. That is not an acceptable standard for preserving the integrity of a court system. The behavior in question has been intentional, premeditated, and intransigent. It was designed to reach the farthest boundaries of the public consciousness. It should be presumed to have had its intended effect.

The Court of Appeals acknowledged that the applicable test under *Gentile* is whether the conduct generated a "substantial likelihood" of prejudice, yet remanded for an evidentiary hearing to determine whether "actual" prejudice occurred.

***824** We hereby affirm the trial court's understanding of *Gentile.* Plaintiff's and her counsel's numerous public references to Bennett's inadmissible, expunged indecent exposure conviction, despite a court order excluding such evidence, were obviously intended to prejudice potential jurors. The trial court thus warned the parties and counsel that all public references to the expunged conviction in violation of the ethical rules would result ***401** in dismissal. This limitation on plaintiff's and her counsel's speech only applied to speech that was substantially likely to have a materially prejudicial effect and that, therefore, violated the rules of ethics. It did not prohibit plaintiff and her counsel from speaking about sexual harassment or the general nature of plaintiff's case. Judge Giovan, at the dismissal hearing, acknowledged the importance of upholding the First Amendment and drew a distinction between protected speech and speech merely designed to thwart the judicial process. He stated to defense counsel:

Well, now, before we move further, I think you understand that we need to draw a distinction between a party's willingness and right to disseminate to the public their ideas of how they've been unjustly treated and the like, and even criticism of the Court as opposed to what's really at stake here, and that is efforts to thwart the judicial system, and that is to disseminate, for example, excluded evidence and evidence forbidden to be disseminated by statute, which you have referred to. But nevertheless, you do need to differentiate between those two things.

The rules of evidence are designed to ensure fairness in the administration of justice, eliminate unjustifiable expense and delay, and promote the growth and development of the law of evidence. MRE 102. Judge Macdonald's exclusion of Bennett's expunged conviction was based

on the rules of evidence. She specifically relied on MRE 404(b) in excluding the evidence, determining that the evidence would not be offered for any purpose other than to show Bennett's propensity to conduct himself in this manner. Judge Macdonald further relied on MRE 403 to determine that, even if the evidence were relevant, its undue prejudice substantially outweighed its probative value in light of the availability of alternative means of proof. Judge Macdonald's ruling, and Judge Giovan's subsequent limitation*402 on plaintiff's and her counsel's speech, was in accord with the purpose of the evidentiary rules. Moreover, the rulings were necessary to protect defendants' fundamental right to a fair trial and were directly aimed at protecting potential jurors from prejudice.

As the United States Supreme Court noted in the *Gentile* case, few, if any, interests are more fundamental than the right to a fair trial by an impartial jury. Plaintiff stated that nothing would deter her from continuing to publicize Bennett's expunged conviction, and that she would post it on the Internet if she could. Additionally, plaintiff's counsel, despite court orders, publicly divulged information regarding the excluded expunged conviction. Judge Giovan merely exercised his " 'affirmative constitutional duty' to minimize the potential for prejudicial pretrial publicity," *United States v. Koubriti,* 307 F.Supp.2d 891, 897 (E.D.Mich., 2004), quoting *Gannett Co., Inc. v. DePasquale,* 443 U.S. 368, 378, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979), in dismissing plaintiff's case, and did not violate the First Amendment in doing so.

The Court of Appeals requirement that actual prejudice be shown conflicts not only with the "substantial likelihood" test set forth in *Gentile,* but also with the plain language of MRPC 3.6. Moreover, the Court of Appeals standard has no practical **825 workability. It would be impossible to determine "actual prejudice" to a potential jury pool three years after the incident in question. We decline to order an evidentiary hearing that is no more than a fool's errand. The trial court narrowly tailored a restriction on plaintiff's and her counsel's speech consonant with the Michigan Rules of Professional Conduct. The trial court's limitation on plaintiff's and her counsel's speech was narrowly tailored*403 and necessary to prevent prejudice to the potential jury pool and did not violate the First Amendment.

## IV. RESPONSE TO JUSTICE CAVANAGH'S DISSENT

Justice Cavanagh asserts that the majority opinion violates the First Amendment by restricting speech that does not have a substantial likelihood of materially prejudicing the proceedings. We reiterate that the narrow and necessary limitation on plaintiff's and her counsel's speech only applied to Bennett's expunged prior conviction that had been excluded as evidence. Plaintiff and her counsel remained free to discuss the general nature of her case and sexual harassment. We agree with Justice Cavanagh that the First Amendment does protect even offensive expressions, see, e.g., *R.A.V. v. City of St. Paul,* 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). The First Amendment, however, does not protect all speech in whatever circumstances. See, e.g., *Adderley v. Florida,* 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966). The United States Supreme Court has recognized the need to balance the rights of attorneys and litigants in pending cases and the state's interest in fair trials. In recognizing this tension, the Court has held that the First Amendment does not protect speech that has a substantial likelihood of materially prejudicing the proceedings. Contrary to Justice Cavanagh's implication that plaintiff is being punished for being discourteous and offensive toward the court, we affirm the dismissal of plaintiff's case solely because plaintiff and plaintiff's counsel made numerous references to excluded evidence, despite the trial court's oral warning that dismissal would result if such references continued, for the sole purpose of tainting the potential jury pool and denying defendants a fair trial.

*404 Justice Cavanagh opines that plaintiff's and her counsel's references to the excluded evidence did not have a substantial likelihood of materially prejudicing the proceedings. We, however, fail to see how plaintiff's and her counsel's numerous public references to Bennett's prior indecent exposure conviction, after the court ordered the exclusion of that evidence, did

not have a substantial likelihood of materially prejudicing this sexual harassment proceeding. The excluded indecent exposure conviction, which was subsequently expunged, involved sexual behavior that is very similar to the alleged sexual behavior in this case. It could be offered for no other purpose than to show Bennett's propensity to conduct himself in this manner. This is the exact type of evidence that MRE 404(b) precludes. If the narrow limitation on speech in this case cannot pass muster under the substantial likelihood test of *Gentile,* we fail to see what limitation could survive.[FN26]

> FN26. To reiterate, as stated in *Grievance Administrator v. Fieger,* 476 Mich. 231, 264, 265; 719 N.W.2d 123 (2006).
>
> Given the position advanced by the dissenting justices ..., one wonders whether the dissenting justices would simply surrender the legal process to the least restrained and worst behaved members of the bar. With increasingly little need to adhere to the rules necessary to ensure public confidence in the integrity of the legal process, the dissenters would create a world in which legal questions come increasingly to be decided, not by a fair and rational search for truth, but by bullying and uncivil behavior, personal abuse, one-upmanship, and public exhibitionism on the part of those who are custodians of this system, the bar. Justice under the law cannot flourish within such a system.

## ***826** V. CONCLUSION

We conclude that the trial court did not abuse its discretion in dismissing plaintiff's suit. We further hold ***405** that the trial court's explicit warning prohibiting any references to Bennett's excluded conviction did not violate the First Amendment. Accordingly, we reverse the judgment of the Court of Appeals and reinstate the trial court's order dismissing plaintiff's case. Because we hold that a dismissal is appropriate, we need not decide the remaining issue. Additionally, we do not reach the issues in plaintiff's cross-application because they are moot in light of our reinstatement of the trial court's order of dismissal.

CLIFFORD W. TAYLOR, ROBERT P. YOUNG, JR., STEPHEN J. MARKMAN, JJ., concur.

MICHAEL F. CAVANAGH, J. ( *dissenting*).

I agree with the majority that a trial court has the authority to control courtroom proceedings; however, this control must comport with the First Amendment. The desire for "preserving an organized polity," *ante* at 810, cannot be exercised at the expense of an individual's First Amendment right to free speech. Because I believe that the trial court abused its discretion when it dismissed plaintiff's case with prejudice and because I vehemently disagree with the majority's belief that its opinion today does not violate the Constitution, I must respectfully dissent. Further, because I agree with Justice Weaver that the majority's decision undermines the basic tenets of our judicial system, I also concur with her dissent.

## I. THE STANDARDS FOR REVIEWING THE CONDUCT OF PLAINTIFF AND HER ATTORNEYS

Plaintiff Justine Maldonado's cause of action for sexual harassment against Daniel Bennett and defendant Ford Motor Company was dismissed with prejudice on August 21, 2002, because the trial court believed that plaintiff and her attorneys engaged in prejudicial ***406** pretrial publicity. The Michigan Rules of Professional Conduct (MRPC) have an established court rule that specifically governs trial publicity. MRPC 3.6 states:

A lawyer shall not make an extrajudicial statement that a reasonable person would expect to

be disseminated by means of public communication if the lawyer *knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.* [Emphasis added.]

The United States Supreme Court examined the "substantial likelihood of material prejudice" standard in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991), in light of the First Amendment. [FN1] The Supreme ***827** Court observed that this standard "imposes only narrow and necessary limitations on lawyers' speech." *Id.* at 1075, 111 S.Ct. 2720. As the Supreme Court has also noted, "the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press." *Bridges v. California*, 314 U.S. 252, 262, 62 S.Ct. 190, 86 L.Ed. 192 (1941). The evil must be substantial and "extremely serious and the degree of imminence extremely high before utterances can be punished." *Id.* at 263, 62 S.Ct. 190.

> FN1. The United States Constitution provides:
>
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. [U.S. Const., Am. I.]
>
> The Michigan Constitution provides:
>
> Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press. [Const. 1963, art. 1, § 5.]

## ***407** II. THE CONDUCT OF PLAINTIFF AND HER ATTORNEYS WAS NOT SUBSTANTIALLY LIKELY TO MATERIALLY PREJUDICE THE TRIAL

The conduct of plaintiff and her attorneys was not substantially likely to materially prejudice the trial. When plaintiff filed her sexual harassment cause of action, the *Detroit Free Press* published an article about the filing on June 9, 2000. Plaintiff also held a press conference about the filing of her complaint. From that time forward, Bennett's indecent exposure conviction was a matter of public record, available to any member of the public, including any journalist.

Long before Bennett's indecent exposure conviction was ultimately expunged on November 9, 2001, and the trial court made a general statement to the parties about pretrial publicity on June 21, 2002, the indecent exposure conviction and the facts surrounding it were well-publicized. Accordingly, it is improper to blame plaintiff and her attorneys for every subsequent mention of Bennett's indecent exposure conviction, as the majority has, because information about his conviction was available from numerous sources. Journalists had access to this information from the time the complaint was filed, and journalists attended public courtroom proceedings, as they are allowed to do. Police reports were readily available to anyone who properly requested them. This information was contained in pleadings in the circuit court, the Court of Appeals, and this Court, and no objection was made. Further, the indecent exposure conviction was repeatedly discussed in open court. So regardless of whether plaintiff was the original provider of the information, any novice journalist willing to do a nominal amount of research would have ultimately discovered the conviction. See, e.g., *Gentile, supra* at 1046, 111 S.Ct. 2720 (Kennedy, J.) (Although the petitioner shared the information with journalists, it ***408** was also "available to any journalist willing to do a little bit of investigative work.").

Over seven months after information about Bennett's indecent exposure conviction was first made known in relation to this case, on January 19, 2001, Judge Kathleen Macdonald granted

a motion to exclude evidence of Bennett's indecent exposure conviction from plaintiff's trial.[FN2] ***828** Later, on February 16, 2001, the trial court granted a motion to exclude any evidence related to Bennett's indecent exposure conviction. However, *these decisions did not preclude plaintiff and her attorneys from ever mentioning the indecent exposure conviction in public again,* and it is erroneous to attempt to portray them as such. While the majority refers to an order by Judge Macdonald that witnesses who mentioned Bennett's indecent exposure conviction would be considered in contempt of court, this order applied to *Lula Elezovic's case,* not plaintiff's case, and the order applied only to testimony given in court. This order did not restrict *plaintiff's* right to discuss Bennett's indecent exposure conviction in public settings as it relates to her case.

> FN2. Notably, Judge Macdonald recognized that this decision may not be final. She stated the following:
>
> My ruling *right now* is that it [evidence of Bennett's indecent exposure conviction] will not be allowed even as to notice to Ford Motor. *That's my position now.* However, whenever I make a ruling in a vacuum outside the context of a trial, I'm always concerned that when I get in the middle of the trial and I find out I may have made a mistake, I will change my ruling. If I find the probative value of this evidence against only Ford Motor and somehow I can make a limited instruction so that somehow the jury won't take it as propensity evidence, *I would reconsider it. As of right now this evidence is excluded.* [Emphasis added.]

Notably, in between the two decisions excluding evidence of Bennett's indecent exposure conviction, on ***409** January 28, 2001, the *New York Times* published a lengthy article about the multiple claims of sexual harassment at defendant's plant. The article also mentioned Bennett's indecent exposure conviction, including a reference to the indecent exposure conviction made by the former plant manager for defendant's Wixom plant. Another article was published on June 12, 2002, in the *Metro-Times.* In the article, plaintiff is quoted as saying, "They are investigating everything in my life, but not the man who did it to me, not the man who had the criminal record, was in a company car and exposed himself to high-school girls and was convicted of it." However, the article also stated that "[a]ccording to Ford and Bennett's attorney," plaintiff began weaving her tale after she learned of Bennett's indecent exposure conviction.[FN3] Bennett's attorney also talked about Bennett's indecent exposure conviction in the article, as well as how Bennett was falsely accused by the girls and how the conviction was expunged. Bennett's conviction was also mentioned by the attorney for Lula Elezovic, a woman who also alleged that Bennett sexually harassed her; Pamela Perez, another woman who alleged that Bennett sexually harassed her; and a former plant manager for defendant. While the majority ***410** contends that it was proper for the trial court to dismiss plaintiff's case with prejudice for mentioning Bennett's indecent exposure conviction, it conveniently ignores the fact that *defendant's attorney and Bennett's attorney also did the same* to advance their theory of the case to the public.

> FN3. The majority characterizes these remarks as necessary responses to comments made by plaintiff and her attorneys. *Ante* at 814 n. 11. The majority believes that saying that plaintiff is a lying opportunist who crafted her story after learning of the indecent exposure conviction is "not intended to taint the potential jury pool and cause prejudice to plaintiff." *Id.* I, however, believe that an objective reader of the facts of this case will recognize an analytical disparity in the majority's reasoning. Simply, if mentioning Bennett's indecent exposure conviction is-as the majority asserts-an attempt to influence the jury pool, then publicly arguing that plaintiff fabricated claims of sexual harassment in a desperate attempt to receive a large cash award from defendant is *exactly the same type of conduct that the majority finds so egregious.*

On May 17, 2002, another evidentiary hearing was held in front of Judge William Giovan.[FN4] At a conference in chambers, defendant's attorney requested a gag order directing plaintiff's attorneys not to publicize Bennett's expunged indecent exposure conviction. The court *declined to issue a gag order.*

> FN4. Judge Giovan was assigned to the case after Judge Kathleen Macdonald was assigned to another division of the circuit court.

In the course of another evidentiary hearing on June 21, 2002, the trial court ***829** briefly stated that it would dismiss the case if it found that a party was "causing some difficulty in our getting a fair jury ...." Yet this "explicit warning," as the majority repeatedly calls it, was so vague and fleeting that it cannot possibly take the place of a formal court order. It provided no guidance to the parties about what conduct was prohibited and clearly made no specific mention of Bennett's expunged conviction. Moreover, because the conviction had been previously referenced in the media and the trial court had *refused to issue a gag order to prohibit this conduct,* there can be no fair inference drawn from the trial court's offhand comment that it was now prohibiting any mention of the conviction.

It is important to note that the entire exchange about the possibility of dismissal occurred in an offhand manner as follows:

*Mr. Morgan* [ *Bennett's counsel* ]: But first, they tried Mr. Bennett's deposition, and they unilaterally scheduled it for ***411** the 12th, knowing that they had fed the Metro Times with all the information for that horribly one-sided, inflammatory article that came out- [FN5]

> FN5. Part of this "one-sided" article states as follows:
>
> Perhaps the plaintiffs are colluding to pick Ford's pockets. And perhaps Maldonado is the woman Ford portrays her to be-a greedy, sexually wanton, emotionally troubled ringleader of a conspiracy to gouge the company.
>
> Or perhaps she and the other women are telling the truth.

*The Court:* You think it was one-sided?

*Mr. Morgan:* I haven't heard anyone comment to me to the contrary in the past week and a half.

*The Court:* I will just tell you that I don't know who it was, but somebody thought that it made a fair presentation. That's neither here nor there, if that makes you feel any better.

*Mr. Morgan:* Well, the night before, and my client was ready to appear for the deposition in the *Perez* case. We had filed a motion for a protective order that we had scheduled for the previous Friday, and that motion for a protective order was, number one, to have the judge limit-

*The Court:* But, you know, since you mentioned that article, where's this coming from? I thought that there is a prohibition against counsel speaking to-making public statements designed to affect litigation.

*Ms. Hardy* [ *defendant's counsel* ]: There certainly is. There's an ethics rule which prohibits counsel from intentionally trying to taint a jury pool by making the public aware of excluded evidence, which is exactly what's been occurring for quite some time.

*The Court:* Is counsel being quoted in this?

*Mr. Washington* [ *plaintiff's counsel* ]: I think counsel on both sides. Ford was not, but Mr. Morgan and Ms. Massie [plaintiff's attorney] and I were both quoted, all quoted.

*The Court:* I'm not sure-well-

***412** *Ms. Hardy:* It was initiated, without doubt, and Mr. Washington will not dispute this, by Mr. Washington, as all the press has been initiated by his office, and the constant publicity is one issue, but the really serious issue is the effort by Mr. Washington to make sure that the press continues to report evidence or information concerning this expunged conviction so that some way, somehow, irrespective of this Court's ruling-

*The Court:* I'm not making any decisions about this, but I'm going to tell you one thing. If I ever reach the conclusion***830** that somebody is violating that ethical obligation and causing some difficulty in our getting a fair jury, I will dismiss the case with prejudice, or, and I should say, on the other side, grant a default judgment. I just want everyone to know that. And then whatever counsel is involved can answer to their client. [Emphasis added.]

Contrary to the majority's assertions, the trial court did not advise the parties "in no uncertain terms that references to the excluded conviction were to cease." *Ante* at 820 n. 23. And the trial court did not "explicitly warn [ ] the parties and the attorneys that further references to the excluded conviction would result in dismissal." *Id.* In fact, there was no "explicit warning" that the case would be dismissed if remarks about the conviction were made, and there was no warning about what conduct would result in dismissal. A review of the quoted transcript of the exchange reveals that *not once* does the trial court even utter a word about the expunged indecent exposure conviction or excluded evidence.

Remarkably, I need only quote the trial court's own words to show the falsity of the majority's position that the trial court "explicitly warned the parties that [it] would dismiss the case if the inappropriate remarks regarding the excluded conviction continued." *Ante* at 820. The trial court itself stated, "I told everybody then [at the May 17 hearing], certainly in chambers and ***413** maybe again after that on the record, I don't know that I repeated it on the record, that *I had no intention of telling anyone what they can say.*" (Emphasis added.) At another hearing, the trial court stated, "I think I don't have the right to decide for myself what a lawyer can say to the public. I do not have that right." And finally and most importantly, "I have never issued such an order in my life." Therefore, I fail to see how the majority can characterize the trial court's words as being an "explicit warning" when the trial court itself does not believe it issued such a warning.

The trial court's own statements that it did not issue an order or warning that explicitly restricted what could be said should persuade a reasonable reader that no such order was entered or warning issued that prohibited the mention of the indecent exposure conviction. Yet the majority chooses to ignore this reality in favor of a factual scenario that it created and that it *wishes* had occurred. The majority attempts to portray an order excluding evidence from trial as having the same effect as an order precluding any mention of this evidence in public, and this erroneous portrayal is the crux of the majority's analysis. Remarkably, the majority's entire analysis relies on the faulty premise that two orders-one of which was never even entered-dealing with different topics and restricting different conduct can actually be the same. But an order excluding evidence is not magically transformed into an order precluding the mention of the evidence in public no matter how much the majority wishes it were so. Unfortunately, I believe that the majority has steadfastly refused to acknowledge the difference because it would show that its analysis is insupportable.

While the majority labels as "preposterous" the dissent's position that an order excluding evidence from a ***414** trial is not the same as an order precluding the mention of this evidence in public, the majority never goes beyond name-calling to explain its position that an order

excluding evidence now means that this evidence can never be mentioned in any forum again. Unfortunately, the majority's insistence on resorting to such tactics and its refusal to explain its position is becoming standard ***831** operating procedure whenever the majority cannot legally support its position. In this case, the majority so desires a specific outcome that it ignores the fact that an order excluding evidence cannot be labeled an order precluding mention of this evidence in public, and this blind adherence to its favored outcome leads it to espouse a position that is completely indefensible.

Moreover, the trial court's brief remarks at the evidentiary hearing about ethical obligations were made with no hearing or information about what plaintiff and her attorneys had or had not been doing. There is no indication that the trial court believed that plaintiff and her attorneys had been engaging in misconduct and that they must now cease any of their activities. The trial court's general comments were made in passing to both parties. *There was no formal or informal hearing on this matter;* there was only an extremely brief exchange. Also, contrary to the majority's contention, a comment made by plaintiff at a rally protesting sexual harassment is not adequate evidence that plaintiff understood the trial court's June 21, 2002, "order." In response to a reporter's question at the rally, plaintiff stated that she was not going to quit fighting sexual harassment, even if that meant that her case would be dismissed. However, the news report does not show the question posed by the reporter that prompted plaintiff's statement. Notably, there was *no* mention of Bennett's expunged conviction during this news broadcast. What was mentioned during the broadcast was a statement ***415** by a spokeswoman for defendant, in which she said that she would not comment on the case, but she did note that the judge had asked those involved to refrain from drawing attention to the case. While the majority draws the conclusion from the broadcast that plaintiff somehow understood a limitation on referencing Bennett's expunged conviction when no such limitation was ever ordered or discussed by the trial court, I draw no such conclusion. It is highly probable that plaintiff was referring to the same directive that defendant's spokeswoman was referencing-that the trial judge asked the parties to refrain from drawing *unnecessary* attention to the case. But there is no indication that such a vague "request" was somehow transformed into an "order" regarding referring to Bennett's expunged conviction merely by plaintiff's comment.[FN6]

> FN6. Plaintiff's counsel later even sought more specificity and argued that the trial court's request was too vague to provide any guidance because "there's no way that any member of [plaintiff's] legal team could know when you had drawn a conclusion, as you said, that we were running afoul of the ethical rules ...."

As it relates to the conduct of plaintiff's attorneys, the majority states that it was misconduct for plaintiff's attorneys to have "appeared in television news broadcasts that specifically referred to Bennett's expunged conviction." *Ante* at 821. Yet, in over ten televised news reports, plaintiff and her attorneys do not once mention Bennett's indecent exposure conviction or the events that led to the conviction. Notably, the only person to comment off-camera on the conviction in one of the news reports is a spokesperson for *defendant.* Further, while the 1995 conviction is referenced in various televised news reports, an attorney for Bennett or defendant appears in each one of these reports. If it was ***416** misconduct for plaintiff's attorneys to appear in these reports, I fail to see why defendant is not being held to a similar standard.

I further note that, in a September 12, 2001, article by The Associated Press, it is *Bennett's* attorney who mentions the indecent exposure conviction, not plaintiff's attorneys.***832** In an October 10, 2001, article in the *Detroit Free Press,* it is again Bennett's attorney who mentions the indecent exposure conviction as he characterizes plaintiff and the other women who allege sexual harassment by Bennett as women who are lying, looking for easier jobs, "out to make a quick buck," and attempting to capitalize on Bennett's indecent exposure conviction.

Notably, "in some circumstances press comment is necessary to protect the rights of the client

and prevent abuse of the courts." *Gentile, supra* at 1058, 111 S.Ct. 2720 (Kennedy, J.). "[A]n attorney may take reasonable steps to defend a client's reputation ...." *Id.* at 1043, 111 S.Ct. 2720. In this case, defendant made numerous comments to the media regarding plaintiff and her claims of sexual harassment. Bennett's and defendant's strategy was clear. Plaintiff was a liar. Bennett's attorney made repeated, explicit statements to the media-plaintiff and the other women who alleged sexual harassment were lying. Defendant's attorney stated that plaintiff had "credibility issues." In the June 12, 2002, *Metro-Times* article, Bennett's attorney said that plaintiff and the other women suing defendant and Bennett were lying about the harassment and were motivated in large part by greed. Defendant's defense was summarized as being that "Maldonado is an overweight opportunist who is colluding with co-workers to make a fortune by falsely accusing Bennett of sexual harassment and falsely accusing the company of doing nothing about it." Pretrial*417 allegations against Maldonado included an assertion that she had had sex in a car in defendant's parking lot and frequently took her underwear off at work and hung it for all to see. And defendant's attorney repeatedly attempted to trivialize testimony and evidence that other women had been sexually harassed by Bennett by referring to this as "me too" evidence.

In light of the forceful and contentious tactics engaged in by both parties, I do not believe that the mere mention of an *expunged* conviction of indecent exposure that *some jurors might hear* had a substantial likelihood of materially prejudicing the trial. See, e.g, *Gentile, supra* at 1058, 111 S.Ct. 2720 (Statements made by an attorney alleging that the police department and the prosecutor's office were corrupt were not substantially likely to materially prejudice the proceedings.). It is not surprising that *defendant* would make this argument because it would like as little attention as possible paid to this case because it finds itself defending yet another sexual harassment claim involving Bennett. What is surprising, however, is that the majority agrees with defendant and takes the position that dismissal with prejudice is a reasonable response for the courts in a matter in which plaintiff and her attorneys have behaved in a manner *entirely consistent* with the actions of defendant's attorneys.

Simply, if plaintiff and her attorneys are criticized for seeking to influence the public perception of events by talking about Bennett's indecent exposure conviction, then I fail to see how defendant's attorneys were not attempting to do the same. Both parties sought to negatively portray their adversary's position in the media. While plaintiff is criticized by the trial court for sending out a press release, defendant also sent out *418 press releases involving this case, yet it is only plaintiff who is being penalized with the extreme sanction of dismissal with prejudice.[FN7]

> FN7. I also note that after investigating this matter, the state of Michigan's Attorney Grievance Commission did not find any evidence of misconduct that warranted further action, and it dismissed complaints filed by Bennett's attorney against plaintiff's attorneys.

**833 The attention paid to this case unmistakably shows that public interest is going to be more acute when the matter at issue is controversial. See *Bridges, supra* at 268, 62 S.Ct. 190. Sexual harassment, and, in this case, its alleged pervasiveness at defendant's facilities, is a matter of public interest that will engender public discussion.[FN8] As the *Detroit Free Press* reported in an October 10, 2001, article, various women complained of sexual harassment at defendant's Wixom plant, including women who were high-level supervisors. In the article, a manager for the Michigan Department of Civil Rights stated, " 'It's an extraordinary situation when you've got that many [sexual harassment complaints].... Filing a lawsuit is not something women take lightly.' "

> FN8. Other women have also alleged sexual harassment involving Daniel Bennett. Notably, this Court has issued two other opinions involving similar allegations against Bennett. See *Elezovic v. Ford Motor Co.*, 472 Mich. 408, 697 N.W.2d 851 (2005); *McClements v. Ford Motor Co.*, 473 Mich. 373, 702 N.W.2d 166 (2005). Further, a

> majority of this Court addressed by order another case dealing with alleged sexual harassment by Bennett. *Perez v. Ford Motor Co. No 2*, 474 Mich. 1057 (2006).

Making this case an even bigger issue of public interest is the manner in which the judicial proceedings are conducted, and the allegation, supportable or not, that participants are not receiving fair treatment in our courts. The public undoubtedly has an interest in ensuring that proceedings are conducted fairly. But punishing comments made while the case is pending will "produce their restrictive results at the precise time **419* when public interest in the matters discussed would naturally be at its height." *Bridges, supra* at 268, 62 S.Ct. 190. It is axiomatic that under the majority's rationale, cases that command the most public interest will be removed from the arena of public discourse. See *id.* It may take years to resolve a case, and the majority's position effectively silences negative critiques of the justice system and its parties during that time. *Id.* With this, I cannot agree.

## III. OTHER ADEQUATE AVENUES WERE AVAILABLE TO THE TRIAL COURT

The trial court had numerous other options to use before employing the drastic measure of dismissing plaintiff's case with prejudice. The possibility that other less extreme measures could have been used by the trial court is a weighty factor that must be considered. See, e.g., *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978). The trial court could have required a continuance; moved the location of the trial; continued forward with sequestered, individualized voir dire; or continued forward with voir dire and a larger pool of jurors. See, e.g., *Gentile, supra* at 1044, 111 S.Ct. 2720 (Kennedy, J.). At the very least, the trial court could have issued an *order* forbidding any future disclosure by the parties of Bennett's indecent exposure conviction. There is no record that any of these options were seriously considered by the trial court.

The majority appears to argue that plaintiff would not comply with such an order. But plaintiff's sarcastic and posturing comments to defense counsel that she had told people about the conviction and would continue to do so cannot seriously be deemed evidence from which it can be extrapolated that plaintiff would refuse **420* to comply with an order *from the court.* Notably, it is clear that the trial court ***834* never thought it issued an order to any of the parties. The trial court stated:

I don't believe in gag orders. I've never issued a gag order.... I have heard from time to time judges issuing orders personal to the attorneys saying you can't talk about this case, you can't do this, you can't do that. I have never issued such an order in my life.... I haven't done it in thirty years and I didn't do it in this case. [Emphasis added.]

Moreover, defendant's attorney knew that an order was not entered. During a motion hearing, defendant's attorney reiterated the court's comment during a prior hearing that "you were not issuing an order ...." During the same hearing, Bennett's attorney also said that he had asked the court to issue an order, but the court had declined. And in any event, whether plaintiff theoretically would comply with such an order is unfounded speculation. The critical fact is that plaintiff is suffering the ultimate punishment for violating an alleged "order" that was never even issued.

To fully understand this case and any comments made by plaintiff, it is important to note that during her deposition, plaintiff endured days of questioning. At one point, her attorneys even filed a motion for a protective order barring further deposition questioning of plaintiff. Plaintiff was questioned about her weight and her Internet habits. Evidence was sought and plaintiff was also questioned about her sexual fantasies, prior sexual assaults, sexual habits, and religious beliefs, as well as her brother's drug addiction and her father's criminal past. This case was highly contentious with defense counsel repeatedly claiming that plaintiff was lying so that she could receive a damages award. Plaintiff's statement of defiance to opposing

counsel cannot reasonably*421 be deemed dispositive evidence that she would continue to discuss excluded evidence if ordered not to do so by the court. While I do not condone disrespectful behavior during depositions or during any aspect of a proceeding, plaintiff's response was a human, albeit inadvisable, response in light of the contentious proceedings. But the statement did not rise to such a level that her case should be dismissed with prejudice because she made it, and I vehemently disagree with the majority that doing so was within the range of reasonable and principled outcomes at the trial court's discretion.

Remarkably, the trial court expressed no real concern about the ability of jurors to impartially decide this case. During a hearing to decide defendant's motion to dismiss, the trial court stated it was not listening to arguments to determine if the conduct of plaintiff and her attorneys impaired defendant's right to a fair trial. The trial court stated, "I think it is often possible in high publicity cases to-you know, with appropriate safeguards, to try a case without-it may be difficult sometimes-without the publicity infecting the trial." Defendant's attorney agreed that the gravamen of the proceeding was about the "alleged misbehavior" of plaintiff and her attorneys in publicizing material and it was not whether defendant could receive a fair trial.

The majority now wants to portray this case as being about a defendant's right to a fair trial. See *ante* at 811. It claims that the "trial court's limitation on the speech of plaintiff and her counsel was a narrow and necessary limitation aimed at protecting potential jurors from prejudice." *Ante* at 811. But I fail to see how *necessary* it was when the trial court itself did not even consider this as a reason for dismissing the case with prejudice. While the majority now wants to portray this case as *422 being **835 about a defendant's right to a fair trial because this portrayal better supports the majority's outcome, I find this depiction to be disingenuous at best because neither the trial court nor defendant itself viewed the case in this way.

## IV. THE CONDUCT OF PLAINTIFF AND HER ATTORNEYS DID NOT VIOLATE MRPC 3.5 AND MRPC 8.4

The majority states that the trial court did not rely on MRPC 3.5 and MRPC 8.4 in reaching its conclusion to dismiss plaintiff's case. However, the majority nonetheless examines the conduct of plaintiff and her attorneys in light of these rules to provide further evidence that the conduct warranted dismissal of plaintiff's sexual harassment cause of action. MRPC 3.5 states the following:

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;

(b) communicate ex parte with such a person concerning a pending matter, except as permitted by law; or

(c) engage in undignified or discourteous conduct toward the tribunal.

Regarding MRPC 3.5, the majority refers to a "sarcastic" comment made by one of plaintiff's attorneys to the trial court. Further, the attorney also made a comment during a television interview that it was hard for a plaintiff to get a fair trial when the defendant is a large company like Ford Motor Company. This comment stemmed from plaintiff's filing of an emergency motion for disqualification of the trial judge because, in part, a member of the firm representing defendant who had entered appearances in the matter for defendant was the reception chairperson for a "gala campaign *423 reception" fundraising event for the judge at the Opus One Restaurant in Detroit. After failing to get plaintiff's attorney to disclose who

shared the invitation with her and when, the trial judge refused to disqualify himself and then issued an order denying plaintiff's motion to dissolve the order excluding evidence related to Bennett's 1995 conviction. And later, on August 21, 2002, the trial court dismissed plaintiff's case with prejudice because it claimed that plaintiff and her attorneys had engaged in prejudicial pretrial publicity.

"There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment." *Gentile, supra* at 1034, 111 S.Ct. 2720 (Kennedy, J.). "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama,* 384 U.S. 214, 218, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966). This includes "the manner in which government is operated or should be operated, and all such matters relating to political processes." *Id.* at 218-219, 86 S.Ct. 1434. In *Gentile, supra* at 1033-1034, 111 S.Ct. 2720 the defendant was an attorney who held a press conference that criticized the state for indicting his client and not indicting members of the police department, who he referred to as "crooked cops." This speech was protected by the First Amendment. *Id.* at 1058, 111 S.Ct. 2720.

People may disagree about whether the comment by plaintiff's attorney about the bias of "Metro Detroit" judges was rude or forthright, crude or candid. The statement could even be deemed unjustifiable. However, it was within the attorney's constitutional rights to make the statement. "The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the ***836*** character of ***424*** American public opinion." *Bridges, supra* at 270, 62 S.Ct. 190. The essence of the right to free speech is that it gives the speaker the opportunity to express the speaker's viewpoints, valid or not. The citizens of Michigan are intelligent and do not need speech to be sanitized. It does not advance the ideals of the justice system to shelter the public from comments, even those that may be deemed unwarranted by some.

Moreover, there is nothing inherently undignified or discourteous in criticizing a court's decisions. In fact, a judge should expect these critiques as a "judge must expect to be the subject of constant public scrutiny." See Code of Judicial Conduct, Canon 2(A). But even if an attorney behaves in a manner that is deemed undignified or discourteous, then sanctions can be imposed against the *attorney.* Indeed, if every attorney who complained about a court's ruling had his client's case dismissed, the dockets of our state's courts would be cleared almost immediately.

At the outset of its opinion, the majority expresses a concern about "preserving an organizedpolity...." *Ante* at 810. And I must note that I do not dispute that it would certainly be easier for a trial court to handle proceedings if there were no fear of criticism for its rulings. However, the ease of a trial court in managing its day-to-day affairs is not sufficient to infringe on plaintiff's First Amendment rights in this case. Our citizens' constitutional right to free speech does not exist merely when it falls within the majority's narrowly defined "orderly" parameters. The First Amendment exists to protect speech-discourteous, disorderly, and sometimes downright offensive. "Freedom" is the first and foremost concern protected by the First Amendment, not order. The majority has offered nothing more than conjecture that the actions of plaintiff would impinge on ***425*** the parties' right to a fair trial, but the lack of any real concern about a fair trial is particularly obvious when one considers that the *trial court itself did not have such a concern.* The majority further ignores that before speech can be punished, it must be determined to have a *substantial* likelihood of *materially* prejudicing the proceedings. See MRPC 3.6. Trial court proceedings are not protected by restricting an individual's right to criticize those very same proceedings.

Regarding MRPC 8.4, the rule states the following:

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;

(c) engage in conduct that is prejudicial to the administration of justice;

(d) state or imply an ability to influence improperly a government agency or official; or

(e) knowingly assist a judge or judicial officer in conduct that is a violation of the Code of Judicial Conduct or other law.

The majority states that plaintiff's counsel did not restrain plaintiff from publicizing Bennett's indecent exposure conviction and that plaintiff's attorneys participated with plaintiff in this "misconduct" on numerous occasions. The majority refers to MRPC 8.4(a), but I fail to see how plaintiff's attorneys engaged in misconduct through the acts of plaintiff. There is no evidence that plaintiff's attorneys counseled**837 her to speak about Bennett's indecent exposure conviction. And I disagree that participating in a rally-a time-honored*426 tradition in this country-and speaking to the media constitute "misconduct" that warrants dismissal of plaintiff's case with prejudice.

Finally, the majority states that remanding for an evidentiary hearing about the specifics of the conduct of plaintiff and her attorneys is "no more than a fool's errand" that it refuses to engage in. *Ante* at 825. While I disagree that the conduct of plaintiff and her attorneys had a substantial likelihood of materially prejudicing the trial, I fail to see what is foolish about remanding to specifically determine what happened, when, and why. When a person's First Amendment rights are at stake and the extreme sanction of dismissing a cause of action with prejudice has been ordered, the majority's steadfast refusal to examine the facts in light of the timetable of events is troubling to say the least.

## V. CONCLUSION

The First Amendment does not exist merely to protect courteous and genteel speech. The First Amendment "must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." *Bridges, supra* at 263, 62 S.Ct. 190. Today, I believe that the majority has ignored the mandates of the Constitution in an ill-advised and unnecessary attempt at maintaining "order" in our courts. I believe that the comments of plaintiff and her attorneys fall well within the parameters of the First Amendment. Accordingly, I respectfully dissent and would affirm the decision of the Court of Appeals.

ELIZABETH A. WEAVER, MARILYN J. KELLY, JJ., agrees.

WEAVER, J. ( *dissenting*).

The majority's assertion that its decision today is "[a]t the heart of preserving an *427 organized polity" is false. *Ante* at 810. I concur fully in Justice Cavanagh's dissent because I agree that the circuit court's dismissal of plaintiff's case violated her First Amendment right to free speech.

In addition to the First Amendment violation, I write to explain that the premise of the circuit court's dismissal of plaintiff's case had no legal validity and, therefore, the majority's acrobatic effort to justify its decision to affirm the circuit court's order does not preserve an organized polity, it undermines it.

An organized polity is governed by the law and is preserved by courts that apply the law and objectively state the facts. In this case, the circuit court did not establish a legal foundation for its dismissal of plaintiff's case, it acted on a whim. The circuit court's decision was, therefore, an abuse of discretion. Now, the majority legitimizes the circuit court's order by misstating the facts of the case and misapplying the law. The majority's decision abuses this Court's appellate review power and, therefore, is inconsistent with the preservation of an ordered polity.

The circuit court in this case dismissed with prejudice plaintiff Justine Maldonado's sexual harassment action against defendant Ford Motor Company and Ford's employee, defendant Daniel P. Bennett. The circuit court premised its dismissal on pretrial publicity that it attributed to plaintiff and plaintiff's lawyers and that referred to defendant Bennett's prior conviction for indecent exposure in an unrelated case. The circuit court found that the publicity violated the Michigan Rules of Professional Conduct, MRPC 3.6. The Rules of Professional Conduct govern the conduct of lawyers. MRPC 3.6 prohibits lawyers from making extrajudicial statements ***838** about a case that might materially prejudice judicial proceedings. Despite the fact that MRPC 3.6 ***428** only applies to the conduct of lawyers and the fact that there is no evidence that her lawyers violated the rule, the circuit court opined that Ms. Maldonado's activities could be imputed to her lawyers and dismissed the case.

The question presented is whether the circuit court's dismissal with prejudice of Ms. Maldonado's case was an abuse of discretion. I would hold that it was an abuse of the circuit court's discretion to dismiss plaintiff's case for the reasons set forth below, and for those stated well by Justice Cavanagh in his dissent.

I

Because the majority mischaracterizes facts pertinent to understanding this case, the following time line lists the important dates and events in this case's history:

• June 9, 2000: Ms. Maldonado files her sexual harassment cause of action.

• June 9, 2000: The *Detroit Free Press* publishes an article referring to defendant Bennett's unrelated indecent exposure conviction. The pending case, including statements about the case by both sides, is regularly in the media thereafter.

• January 19, 2001: Judge Kathleen Macdonald grants the motion to exclude from plaintiff's trial evidence of defendant Bennett's prior and unrelated indecent exposure conviction.

• February 16, 2001: Judge Macdonald enters an order excluding from plaintiff's trial evidence of defendant Bennett's prior and unrelated indecent exposure conviction.

• September 11, 2001: Plaintiff's lawyers issue a press release referring to defendant Bennett's prior and unrelated conviction for indecent exposure.

***429** • November 2001: Defendant Bennett's prior and unrelated conviction for indecent exposure is expunged.

• June 21, 2002: During a hearing regarding the motion to dissolve Judge Macdonald's order to exclude evidence of the expunged and unrelated indecent exposure conviction, Judge

William Giovan warns the parties about pretrial publicity and states that if a party violates some ethical obligation, the case could be dismissed.[FN1]

> FN1. Specifically, Judge Giovan said:
>
> I'm not making any decisions about this, but I'm going to tell you one thing. If I ever reach the conclusion that somebody is violating that ethical obligation and causing some difficulty in our getting a fair jury, I will dismiss the case with prejudice, or, and I should say, on the other side, grant a default judgment.
>
> The majority incorrectly characterizes this warning by suggesting that "Judge Giovan expressly warned plaintiff that if she continued to disseminate information regarding Bennett's excluded conviction in violation of Judge Macdonald orders, he would dismiss her case." *Ante* at 822. Contrary to the majority's characterization, the warning issued by Judge Giovan simply warned the parties to not violate any ethical obligation. Judge Macdonald's order only excluded the evidence from trial, not the public forum.

• July 3, 2002: During a hearing on plaintiff's motion for Judge Giovan's disqualification, Judge Giovan states on the record that his prior warning was *not a court order.*

• August 21, 2002: During a hearing on defendant's motion to dismiss the case, defendant's attorney states that the case was in the news again. Judge Giovan dismisses the case with prejudice.

II

The circuit court did not establish a legal foundation to support its dismissal of ***839*** Ms. Maldonado's case. The ***430*** court based its dismissal of Ms. Maldonado's case on her and her attorneys' alleged violation of the Michigan Rules of Professional Conduct, MRPC 3.6. The violation identified by the circuit court involved pretrial publicity by Ms. Maldonado and her attorneys regarding defendant Bennett's prior conviction for indecent exposure, which Judge Giovan suggested violated Judge Macdonald's order to exclude that evidence from trial.

The circuit court's attempt to hold Ms. Maldonado responsible for a violation of MRPC 3.6 is unsupportable. MRPC 3.6 only applies to lawyers. The rule states:

A *lawyer* shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the *lawyer* knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding. [Emphasis added.]

Judge Giovan's opinion reveals that he was aware that MRPC 3.6 does not apply to nonlawyers. Nevertheless, he concluded that a nonlawyer client "is not immune for knowingly doing what [her lawyers] cannot." MRPC 3.6 does not apply to nonlawyers; therefore, it was an abuse of discretion to base the dismissal of Ms. Maldonado's case on her violation of a rule that does not apply to her.

Further, Judge Giovan failed to identify any violation of MRPC 3.6 by Ms. Maldonado's attorneys that warrants dismissal of the case. Judge Giovan noted that her lawyers "appeared in television news broadcasts that made specific references to Mr. Bennett's criminal conviction." However, Judge Giovan did not identify a specific instance when the lawyers themselves mentioned the conviction in these broadcasts or publications. My review of the record reveals that the lawyers did not themselves refer to the conviction.

***431*** It is true that one year before Judge Giovan heard the defendant's motion to dismiss and

two months before defendant's prior conviction was expunged, the law firm representing Ms. Maldonado issued a press release that referred to defendant Bennett's prior conviction. Judge Giovan found that the press release violated MRPC 3.6, suggesting that the lawyers knew trial was imminent when the press release was issued. But the information about defendant's prior conviction referred to in the press release was already well-publicized. Thus, it cannot be concluded that, when the press release was issued, a reasonable person would have expected that the content of the release would likely prejudice an adjudicative proceeding materially. Furthermore, contrary to the majority's assertion otherwise, because Bennett's prior conviction was well-publicized before plaintiff's lawyer's 2001 press release, the press release cannot be considered the source for all subsequent news publications that referred to the prior conviction.

Judge Giovan also suggested that the press release somehow violated Judge Macdonald's February 16, 2001, order, which excluded evidence of defendant's prior conviction from trial. However, while Judge Macdonald's order excluded the evidence of defendant's prior conviction from trial, it did not prohibit any and all public reference to the prior conviction by either plaintiff or plaintiff's lawyers.[FN2] ***840** For these reasons, it was ***432** not reasonable for Judge Giovan to premise his dismissal of plaintiff's case on the actions of her lawyers.

> FN2. After Judge Giovan took the case over from Judge Macdonald, defendant Ford and defendant Bennett filed a joint motion for entry of an order directing that the witnesses be instructed regarding excluded evidence and impermissible testimony on July 21, 2002. In their brief supporting their request, defendants stated that every witness in the *separate* trial of *Elezovic v. Ford Motor Co.* had to sign off on a statement indicating that they had been advised of the ruling by the Court regarding inadmissible evidence, and that they were not to mention anything about any excluded evidence, and that they understood the consequence for mentioning any of the excluded evidence would be sanctions including contempt and imposition of all the costs of a mistrial. Defendants request the same process in this case.
>
> The defendants apparently hoped that Judge Giovan would issue an order in this case like that which Judge Macdonald had issued in the *Elezovic* case to prevent witnesses from mentioning defendant Bennett's prior conviction during their testimony on the witness stand. But Judge Giovan did not issue any such order.
>
> In any event, the *Elezovic* order appears to have only limited the witnesses' speech inside the courtroom; it was directed at preventing impermissible testimony during the *Elezovic* trial regarding defendant Bennett's prior conviction that Judge Macdonald had ordered to be excluded from the evidence.

The majority admits that MRPC 3.6 does not apply to Ms. Maldonado because she is not a lawyer. *Ante* at 821. Further, like Judge Giovan, the majority fails to identify any specific instances in which Ms. Maldonado's lawyers violated MRPC 3.6. But, rather than acknowledging the circuit court's abuse of discretion in relying on MRPC 3.6 to dismiss Ms. Maldonado's case, the majority grasps for and creates its own alternative justifications for the circuit court's order.

The majority's primary justification for its decision to affirm the order of dismissal is the need for *order in the court.* In this case, the majority concludes that the dismissal of Ms. Maldonado's case was authorized under MCR 2.504(B)(1), which provides:

If the plaintiff fails to comply with [the court] rules or a court order, a defendant may move for summary dismissal of an action or a claim against that defendant.

However, the mere fact that the court rule permits the circuit court to dismiss a case does not mean that ***433** dismissal is justified on a whim. By the plain terms of MCR 2.504(B)(1), there

must be a violation of an applicable court rule or order to justify a summary dismissal of a case.

To make it seem like MCR 2.504(B)(1) justifies the dismissal of plaintiff's case, the majority intentionally misstates the facts to make it appear that plaintiff and plaintiff's lawyers violated a court order. The majority states: "Judge Giovan expressly warned plaintiff that if she continued to disseminate information regarding Bennett's excluded conviction in violation of Judge Macdonald's order, he would dismiss her case. Plaintiff failed to obey this warning and, thus, Judge Giovan properly dismissed her case." *Ante* at 822. This is untrue. The facts are: (1) Judge Giovan's warning was not an order of the court,[FN3] (2) there *never* was a court order limiting pretrial publicity or references to defendant Bennett's prior conviction, (3) Judge Macdonald's order excluding evidence of defendant Bennett's conviction for indecent exposure from plaintiff's sexual harassment trial imposed no limitation on pretrial publicity, and (4) Judge Giovan did not premise his dismissal on plaintiff's violation of his warnings; instead, he incorrectly attributed plaintiff's activities to her ***841** lawyers to support his conclusion that they had violated MRPC 3.6.

> FN3. Referring to the warning at the July 3, 2002, hearing on plaintiff's motion for his disqualification, Judge Giovan said: "I want to say a thing about gag orders. You've called what I said in court a gag order. Not so. As a matter of fact, I don't believe in gag orders. I've never issued a gag order."

The majority also relies heavily on the assertion throughout its opinion that plaintiff's lawyers were themselves quoted publicly referring to Bennett's prior conviction. Contrary to the majority's assertion, none of ***434** the broadcasts or articles cited by the majority quoted or discussed any statements by Ms. Maldonado's lawyers regarding Bennett's prior conviction for indecent exposure. In those broadcasts and articles, Ms. Maldonado's lawyers made statements about the case and about their perception that the circuit court was biased, but not about the expunged conviction. Immediately after Judge Macdonald ruled that the conviction would be excluded, which was months before Judge Giovan was assigned the case, the lawyers were quoted as saying that they would appeal that order. Thereafter, all quoted statements about Bennett's prior conviction were made by Ms. Maldonado, and Ms. Maldonado was not restricted by any order or court rule from making repeated public reference to Bennett's prior conviction.

It was an abuse of discretion for Judge Giovan to attribute to plaintiff's lawyers responsibility for statements made by plaintiff and the press about the well-known fact that Bennett had a prior conviction for indecent exposure. It does not serve an organized polity for the majority to affirm a ruling that was based on a whim rather than the law.

III

A cornerstone for an organized polity is that courts of law will act in an orderly way, as opposed to acting on a whim. In an organized society, disputes are taken to a court of law for adjudication because a court is impartial and will handle cases with fairness and pursuant to the law. Dismissing Ms. Maldonado's case without a legal foundation is the same as dismissing the case on the basis of a whim. The majority's decision to affirm the circuit court's order damages ***435** the integrity of the judicial system and, contrary to the majority's rhetoric, undermines the basic tenets of an organized society.

MARILYN J. KELLY, J., agrees.

Additional cases regarding proceeding without parties present:

1. *Culley v Walkeen*, 80 Mich 443 (1890).

"The business of the courts cannot be delayed to suit the convenience of suitors." 80 Mich 443, 444 (1890).

2. *Hunter v Szumlanski,* 124 Mich App 521 (1983); reversed 418 Mich 958 (1984).

Court's "spin-off" docket: The trial court called counsel at 2:45 p.m. and informed counsel that jury selection would begin at 3:30 p.m. Jury selection was undertaken without either party being present. Court of Appeals found trial judge "erred by ordering commencement of jury selection and voir dire without affording the plaintiff a reasonable opportunity to be present." 124 Mich App 521, 527 (1983). Michigan Supreme Court summarily reversed this finding, holding that trial court did not err, since it gave "sufficient" notice to counsel and counsel made the decision to tell the client that attendance was not necessary on the first afternoon of trial.

# Where Are The Limits?
# What Every Judge Should Know
# About Referring Attorneys For Grievance

*Robert E. Edick, Deputy Administrator*
*Attorney Grievance Commission*

## Introduction

Remarkably few reports of alleged attorney misconduct are made by judges to the Attorney Grievance Commission. In any given year, only a relative handful of the approximately 3800 grievances investigated by the Commission come by way of judicial referrals.

This is not a recent phenomenon. In 1970, an ABA Special Committee on Evaluation of Disciplinary Enforcement documented a reluctance on the part of judges to report instances of professional misconduct. The Michigan Supreme Court also observed more than 12 years ago that grievances against attorneys came overwhelmingly from their clients. *Grievance Administrator v Attorney Discipline Board*, 444 Mich 1218; 515 NW2d 360 (1994). Nor is it a phenomenon confined to Michigan, as evidenced by the body of legal research devoted to the topic. See, e.g., McMorrow, Gardina & Ricciardone, *Judicial Attitudes Toward Confronting Attorney Misconduct: A View From the Reported Decisions*, 32 Hofstra LR 1425 (2004).

It is, however, a phenomenon that should trouble a profession which takes pride in its self-regulation, and which purportedly imposes ethical duties on its judiciary to take or initiate disciplinary measures against attorney misconduct.

## I. Judicial Duty to Report

The authority to supervise and discipline Michigan attorneys derives from the state constitution and rests with the Michigan Supreme Court. *Schlossberg v State Bar Grievance Bd,* 388 Mich 389; 200 NW2d 219 (1972). This constitutional responsibility is discharged, in turn, by the Commission (acting as the Supreme Court's prosecution arm) and the Attorney Discipline Board (acting as the Supreme Court's adjudicative arm). MCR 9.100, *et seq*. The Supreme Court's role in the area of attorney discipline is undoubtedly primary. It is not, however, exclusive.

Michigan has a long tradition of judicial oversight of the ethical conduct of its court officers. *Evans & Luptak, PLC v Lizza*, 251 Mich App 187; 650 NW2d 364 (2002). All Michigan judges have an independent responsibility to supervise the ethical conduct of attorneys who appear in their courtrooms. *Attorney General v PSC*, 243 Mich App 487; 625 NW2d 16 (2001). This tradition is reflected in the Michigan Code of Judicial Conduct, which the Supreme Court adopted in 1974. Canon 3(B)(3) of the Code provides that "a judge should take or institute

appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware."

The wording of Canon 3(B)(3) is identical to the American Bar Association's 1972 version of the Model Code of Judicial Conduct, which has been criticized as an inadequate guide for judges regarding their responsibility to report attorney misconduct. The ABA drafters addressed these criticisms in their 1990 version of the Model Code of Judicial Conduct, by amending the language to parallel the reporting duty of attorneys. Although the language of Michigan's Canon 3(B)(3) has not been changed, the judicial reporting responsibility for Michigan judges effectively has been updated by virtue of MCR 9.205, which incorporates the Rules of Professional Conduct into the standards of judicial conduct.

Judges, as well as lawyers, are obliged by the Michigan Rules of Professional Conduct to report attorney misconduct. *Grievance Administrator v Fieger*, 476 Mich 231; 719 NW2d 123 (2006). MRPC 8.3 provides that "a lawyer having knowledge that another lawyer has committed a significant violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer **shall** inform the Attorney Grievance Commission." (emphasis supplied)

There will always be an inescapable degree of subjectivity in deciding whether to report attorney misconduct. Proctor, *Duties to Report*, 73 MBJ 64 (Jan 1994). Clearly, neither MRPC 8.3 nor Canon 3(B)(3) requires the reporting of every instance of attorney misconduct, no matter how technical. That would be unworkable. Judges can address relatively minor breaches of ethical rules without having to report the incident to the Commission. JI-85 (March 1994).

A judge would be mistaken, though, to lean too far in the other direction and report only the most serious acts of misconduct, or otherwise rely solely on the efficacy of remedial measures taken in the context of a particular case. Apparently isolated ethical violations may actually be part of a pattern of misconduct which a disciplinary investigation can uncover. Comment, MRPC 8.3. A judicial *ad hoc* approach to reporting permits the unscrupulous lawyer to continue victimizing the public by committing other acts of misconduct. It may also, by delaying timely disciplinary scrutiny, enable lawyers whose behavior is rooted in drug or alcohol abuse to escalate their misconduct until it is so serious that punitive, and not merely rehabilitative, measures become necessary.

The duty to report is not just limited to those acts of which a judge has personal knowledge. Canon 3(B)(3) speaks in terms of awareness, and the knowledge within the meaning of MRPC 8.3 can be based on credible hearsay. Reports to the Commission are not notarized or attested, and a judge need not actually be a witness to the misconduct.

In addition to MRPC 8.3 and Canon 3(B)(3), a more recent and specialized duty of reporting is imposed by MCL 552.630. That statute requires judges to report whenever they suspend an attorney's license for intentionally disobeying a support order. The report is made to the "licensing agency," which for attorneys would be the Supreme Court. Judges should also copy the Commission with the report so it can begin immediate monitoring to ensure that the attorney

complies with MCR 9.119 (i.e., notifying clients, courts and opposing counsel about the suspension, as well as withdrawing from pending cases).

## II. Examples of Reportable Misconduct

About one-half of all grievances filed with the Commission typically allege a lack of diligence, lack of competence, or neglect by the attorney. Often they are accompanied by allegations concerning the attorney's failure to communicate, failure to refund an unearned retainer, or misrepresentations about the status of the client's matter. With the possible exception of attorney incompetence, these categories of misconduct would not in the normal course of events come to the judge's attention.

If such complaints do come to light during the course of litigation, the judge should at least inform the party in question how to pursue a grievance. MCR 9.103(B) imposes a duty to "...assist a member of the public to communicate to the [Commission's] administrator, in appropriate form, a request for investigation of a member of the bar." The judge should advise disgruntled clients to check the Commission's website, www.agcmi.com, or to call the Commission's Detroit office (313-961-6585) for instructions about filing a grievance. A copy of the request for investigation form used by the Commission can be found in the Appendix.

Attorneys who have been found in contempt by a judge are obvious candidates for referral to the Commission. Other examples of misconduct in domestic relations cases which are likely to be noticed by a judge, and which merit reporting, include the following (discipline decisions can be accessed at the Board's website, www.adbmich.org):

**Pleadings**

- Making false allegations in the complaint regarding venue or as to the existence of other pending actions.
  *GA v Stevens*, 95-140-GA (ADB 1997)

**Discovery**

- Filing misleading or incomplete answers to interrogatories or requests for admission.
  *GA v Trombley*, 00-163-GA (HP 2006)(Appeal Pending)
- Using, or employing agents who use illegal or deceptive investigative tactics such as wiretapping or pretexting.

**Judgment**

- Failing within a reasonable time to submit a draft judgment or order.
- Failing within a reasonable time to complete ancillary documents involving pension interests or real estate.

*GA v O'Leary*, 05-106-GA (HP 2006)

**Conflict of Interest**

- Attempting to represent both spouses in a divorce action.
  *GA v Gun*, 96-249-GA (HP Consent 1998)
- Engaging in sexual relations with a client and thereby adversely affecting the client's interests in the representation.

**Fees**

- Charging or attempting to charge a fee in a divorce case which is contingent on the result. [MRPC 1.5(d)].
- Refusing to perform promised legal services because of unpaid fees.
  *In re Daggs*, 384 Mich 729, 187 NW2d 227 (1971)
- Failing to refund any unearned retainer after being terminated, or withdrawing, from the representation.
  *GA v Carson*, 00-175-GA; 00-199-FA (ADB 2001)

**Civility**

- Engaging in assaultive behavior.
  *GA v Fink*, 96-181-JC (ADB 2001) (After Remand)
- Engaging in a pattern of obstructing depositions by using insulting and demeaning language.
  *GA v Dib*, 02-78-GA (HP 2006)(Sanction Hearing Pending)
- Directing profanities toward a judge during the pendency of an action.
  *GA v Vos*, 466 Mich 1211, 644 NW2d 728 (2002)
  *GA v Fieger, supra*
- Engaging in nonconsensual sexual relations with a client.
  *GA v Williams*, 98-203-GA (ADB 2000)

Reportable misconduct also can take place outside of an attorney-client relationship. MCR 9.104(A). Lawyers who represent themselves in divorce actions are still subject to the Rules of Professional Conduct. Furthermore, the misconduct does not need to involve the delivery of legal services. An attorney who commits domestic violence, for example, also has committed professional misconduct. *GA v Floyd*, 05-25-JC (2006). "It is the duty of every attorney to conduct himself or herself at all times in conformity with the standards imposed on members of the bar as a condition of the privilege to practice law." MCR 9.103(A). So-called "private" misconduct is still reportable as misconduct.

## III. How to Report

There are two ways for a judge to bring an attorney's misconduct to the Commission's attention.

The first is for the judge to personally file a request for investigation against the attorney. This is done by identifying the lawyer in question and by providing a factual summary of the alleged misconduct. By acting as the complainant, the judge would be entitled to receive a copy of the attorney's answer and to be kept apprised of the Commission's decision.

The second is for the judge to notify the Commission in writing and specify that the misconduct is being reported under Canon 3(B)(3) and MRPC 8.3. Doing so shifts to the grievance administrator the decision whether to file in his own name a request for investigation against the attorney under MCR 9.109(B)(5). The Commission will not (at least during the investigative phase) disclose the judge's identity as the source of information. However, unless the Commission was to prosecute formal charges before the Attorney Discipline Board, the judge would not be entitled to know the outcome of the investigation.

Whichever way the judge chooses to report the misconduct, he or she is protected by MCR 9.125, which grants absolute immunity from suit "...for statements and communications transmitted solely to the administrator, the commission, or the commission staff, or given in an investigation or proceeding on alleged misconduct..."

Absent actual bias or prejudice, simply communicating the facts of an attorney's misconduct to the Commission is not itself a ground for the judge's recusal, even if the judge acts directly as a complainant. JI-123. (January 2001).

However, in circumstances where the behavior being reported is related to litigation pending before the judge, referral should probably be deferred until completion of the litigation. *Cain v Dep't of Corrections*, 451 Mich 470, n 54; 548 NW2d 210 (1996). There is no statute of limitations in disciplinary law, and a delay in reporting will not preclude the Commission's ability to proceed with an investigation.

## Conclusion

A judge who is considering whether to report an attorney to the Commission should never hesitate to do so out of fear that the disciplinary consequences will be disproportionate to the act of misconduct. An investigation is almost never a career-ending event and, aside from the mishandling of money, the overwhelming majority of grievances do not permanently affect the attorney's ability to practice law.

The Commission closes, sometimes with cautionary language, about 90% of the grievances it investigates. Another 5% of the grievances are concluded with the attorney accepting an admonishment, which in Michigan is not a public record. Approximately 95% of all grievances, in other words, are handled in a confidential manner from start to finish.

The remaining 5% of the grievances do result in formal, public charges being filed with the Attorney Discipline Board. Even so, a formal complaint might be resolved with the attorney

simply being reprimanded, which is public discipline, but has no consequences regarding the ability to practice law.

An attorney who is suspended or disbarred generally has committed a significant ethical violation, or has a poor disciplinary history, or both. So long as it is consistent with protection of the public, the disciplinary system attempts to rehabilitate, not just punish, attorneys who have committed misconduct. For example, attorneys with drug or alcohol problems have been referred to the State Bar of Michigan Lawyers & Judges Assistance Program; or, attorneys who lack law office management skills have been referred to ethics school or have been mentored by more experienced attorney volunteers.

The Commission's prosecutorial philosophy, however, is only one aspect of an effective discipline system. Judges are in a position to detect possible attorney misconduct, perhaps even in its nascent stages before too much damage has been done. Prompt judicial referrals of such matters to the Commission will help demonstrate to the public that we are a self-regulating, not a self-protecting, profession.

State of Michigan

# Attorney Grievance Commission

MARQUETTE BUILDING
243 W. CONGRESS, SUITE 256
DETROIT, MICHIGAN 48226-3259

## REQUEST FOR INVESTIGATION OF ATTORNEY:

_____
(Name of Attorney) (one attorney per request)

_____
(Street and Number)

_____
(City, State, and Zip Code)

_____
(Area Code) (Telephone Number)

Date attorney was hired/Appointed:_____
Type of case(divorce, criminal, probate, etc.):_____
Have you ever previously submitted a Request for Investigation to our office about this attorney?_____
If yes, When?_____

## STATEMENT OF FACTS

*(Please be specific. You may attach additional pages if necessary.)*

*I request an Investigation by the Attorney Grievance Commission.*

| | |
|---|---|
| Date: _____<br><br>*You must provide two (2) completed copies of this form and two (2) completed copies of all attachments. We cannot process unsigned complaints.* | _____<br>(Signature)<br>_____<br>(Name - type or print)<br>_____<br>(Street and Number)<br>_____<br>(City and State) (Zip Code) (Telephone Number)<br><br>Mr._____<br>Mrs._____<br>Ms._____ |

STATE OF MICHIGAN

# Attorney Discipline Board



GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

v Case No. 02-78-GA

ALBERT J. DIB, P 32497,

Respondent.
_____/



**OPINION AND ORDER ADOPTING**
**IN PART THE REPORT OF THE SPECIAL MASTER**

On August 2, 2002, the Grievance Administrator filed a formal complaint alleging that on 17 occasions between 1994 and 2002 respondent deliberately obstructed the orderly administration of justice through discourteous and disrespectful conduct toward other participants involved in the legal process. The complaint also alleged that on another occasion, respondent filed a motion that contained false statements for the purpose of harassing opposing counsel. The Grievance Administrator alleged that respondent's actions violated MCR 9.104(A) and Michigan Rules of Professional Conduct (MRPC) 1.2(a), 3.4(a), 4.4, 6.5(a) and 8.4 (a)-(c).

On October 2, 2003, a Special Master was appointed to receive evidence and file a report, pursuant to MCR 9.117. The Master took testimony over 11 days in 2004, and filed her report on July 14, 2005. The Master made findings of fact which demonstrated that respondent deliberately engaged in a pattern of obstructing depositions by using insulting and demeaning language directed at opposing counsel, generally in the presence of others (including parties, witnesses and court reporters), for the purpose of gaining a tactical advantage or simply to embarrass his opponents. The Master also found that respondent filed a pleading, for the purpose of intimidating and harassing opposing counsel, which falsely alleged that opposing counsel was mentally disturbed and posed a present danger to respondent.

The Master determined that respondent's conduct at depositions was prejudicial to the administration of justice, in violation of MRPC 8.4(a) and (c) and MCR 9.104(A)(4). She determined that respondent's filing of the false pleading violated MRPC 4.4 and MCR 9.104(A)(4). She determined that respondent did not violate MRPC 1.2(a), 3.4(a) and 8.4(b). Finally, the Master determined that respondent arguably violated MRPC 6.5(a), but recommended against finding a violation of this rule.

For the reasons stated below, we: 1) adopt the Master's report and recommendation that respondent violated MRPC 8.4(a) and (c), and MCR 9.104(A)(1) and (4), through his pattern of conduct at depositions; 2) adopt the Master's report and recommendation that respondent violated MRPC 4.4 and MCR 9.104(A)(4) by filing a pleading which falsely alleged that another attorney was mentally disturbed and posed a physical danger to others; and 3) adopt the Master's report and recommendation that respondent did not violate MRPC 1.2(a), 3.4(a), 8.4(b), and MCR 9.104(A)(2) and (3). In addition, we find that respondent's conduct did violate MRPC 6.5(a).

With respect to all but MRPC 6.5(a), we adopt the Master's careful and thoughtful opinion, adding a few comments of our own.

The Master determined, and we agree, that respondent used a variety of demeaning terms to describe counsel who opposed him in 14 depositions between 1994 and 2002, eleven of which took place in just over two years from late 1999 to early 2002.[1] (Report Findings of Fact 2-7.) The Master determined, and we agree, that respondent did this deliberately and without legitimate tactical purpose, usually for the purpose of embarrassing his opponents.[2]

Respondent has defended against the charge of misconduct by arguing that the Attorney Discipline Board has no business regulating attorney speech. Certainly, we are very wary of any restriction on verbal expression. In light of this legitimate concern, we, like the Master, think it important to emphasize at some length, at the outset of our analysis, what this case is not about.

This case is not about an isolated instance of inappropriate conduct or speech. *Cf. Administrator v. Szabo*, 96-228-GA (under the circumstances of *Szabo* an isolated instance of highly inappropriate speech was not misconduct). Rather, the evidence shows that respondent engaged in an extended pattern of deliberately demeaning, patronizing, insulting and obstructive speech. Indeed, the existence of this pattern is significant to our conclusion that respondent's conduct at depositions violated MRPC 6.5(a), 8.4(c) and 9.104(A)(4).

This case is not about uncontrolled outbursts, e.g., a lawyer who, because he is temporarily unable to contain his passion, uses offensive expletives in his excitement. *Cf. Administrator v. MacDonald*, 00-4-GA (not misconduct when attorney referred to opposing counsel as "lying son of a bitch" and "shyster" in one heated private telephone call). Rather, the evidence shows that respondent *deliberately* demeaned, embarrassed and obstructed his opponents.

This case is not about turning the Grievance Administrator into the "language police," in the sense of ensuring that counsel use only inoffensive words during court-related proceedings. *Cf. id.* at 2 ("This panel will not become language referees"). Indeed, the most inherently offensive words respondent used to characterize his opponents are "asshole" and "nitwit" - in other circumstances, the isolated use of those words, or words far more intrinsically offensive, would not rise to the level of misconduct. As the Master noted,

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1 The Master's report does not explicitly refer to two of the depositions which were the subject of the complaint, Exhibits E and F. We do not find significant misconduct in Exhibit F. However, we find that respondent's actions as recorded in Exhibit E do constitute misconduct, as set forth later in this opinion. The Master's report also does not explicitly refer to respondent's statement at the conclusion of the 9/7/01 deposition which is the subject of paragraph 25(o) of the Formal Complaint. We have included that statement within our discussion of the pattern of respondent's misconduct.

2 Respondent testified before the Master over the course of several days. During his testimony he repeatedly offered justifications for the comments he had made to opposing counsel which gave rise to the complaint. One who reads his testimony comes away with the clear impression that these justifications are, as the Master stated with respect to one, "specious." (Report at Finding of Fact 10.) One further comes away with the impression that during his testimony respondent was nearly as contemptuous of the disciplinary process as he appears to have been of opposing counsel.

> "[a]ttorneys are not prohibited from using profane and vulgar language at all times and under all circumstances. Rather, they are prohibited from using such language when to do so would be prejudicial to the administration of justice." *Attorney Grievance Commission v. Alison*, 317 Md 523, 538 (1989).

The misconduct here does not result from the intrinsic nature of the words respondent used, but rather from his deliberate use of these and otherwise innocuous words for the purpose of belittling and embarrassing other participants in the legal process.

Finally, this case is not about speech protected by the First Amendment. *Cf. In re Chmura*, 461 Mich. 517 (2000) (giving narrow interpretation to rule that forbids false statements by candidates for judiciary, in order to avoid First Amendment concerns). Respondent was not making his comments in the course of any political campaign, or for the purpose of informing the public about the legal process. There is no First Amendment right to belittle one's opponent without legitimate tactical reason, nor to obstruct questioning, during the course of legal proceedings.

On the other hand, this case *is* about a pattern of offensive conduct over several years. The complaint alleges that it is respondent's actions "in aggregate" which violated the Michigan Rules of Professional Conduct. The Master considered respondent's aggregated conduct in finding violations of the Rules.

It was not immediately obvious to the Panel that we can or should adopt this approach - that is, to analyze respondent's conduct in toto rather than deposition by deposition. After a good deal of deliberation, we conclude that we both have the authority to consider the aggregate, and we should do so in this case.

To the best of our knowledge, there is no Attorney Discipline Board or judicial precedent in Michigan that is directly on point. However, a New York case, *Matter of Robert A. Kahn*, 791 NYS2d 36 (2005), seems to support this approach. The respondent in *Kahn* was disciplined for a pattern of offensive comments to other attorneys over the course of multiple proceedings.

We also note that there is no apparent difference in principle between aggregating several instances of inappropriate actions during a single proceeding to determine whether there is misconduct, and aggregating several such instances over multiple proceedings. Like the Master, we find it instructive that the Board found that it was the aggregate of offensive speech during a proceeding which constituted misconduct in *Administrator v. Beer*, 93-234-GA. Also, although the Board did not explicitly state that it was considering several incidents *in toto* when it found misconduct in *Administrator v. Warren*, 01-16-GA, it did review the conduct in this way. We therefore conclude that in appropriate cases, we have authority to assess misconduct by looking at aggregated rather than individual actions.

There are probably circumstances where it would not be appropriate to aggregate actions over time to determine whether an attorney committed misconduct. However, that is a question which we need not explore, because we find that this is a case in which aggregating respondent's conduct is the right way to proceed. We do so because we believe there is a cumulative effect of respondent's misbehavior. That is, even if we assume, for the sake of discussion, that the administration of justice was not quite prejudiced enough to constitute misconduct as the result of

any single instance of respondent's verbal abuse of opposing counsel, we believe that his engaging in a pattern of like conduct has a significantly greater negative impact on the administration of justice than does any single such instance.[3]

For instance, respondent's repeatedly embarrassing a particular attorney has a greater negative impact than does his doing so a single time. Respondent's bringing disrespect to the administration of justice in front of a cumulative dozen witnesses and other participants in the legal process has a greater impact than his doing so in front of one or two persons. The repetitious nature of respondent's actions created at least one additional impact. The record shows that among some attorneys, respondent had a reputation for making personal attacks.[4] That reputation would naturally make it more likely that opposing counsel would begin a deposition with respondent with a heightened sensitivity to potentially insulting or obstructive conduct, thereby increasing the potential that the deposition will be disrupted or terminated as a result of a bad interaction between counsel, or that there will be other negative consequences. Finally, respondent's repeated abusive conduct shows a greater disrespect to other participants in the legal system than does a single instance of abusive conduct.

Therefore, we do consider respondent's conduct in the aggregate. Once we do, Board precedent reassures us that the Master was correct in determining that this conduct violated MRPC 8.4(a). *Administrator v. Segel*, 95-210-GA, concerned a respondent who, during the course of a deposition, swore at opposing counsel and questioned his competence and ethics. The Board reversed a panel decision which had found that this was not misconduct, holding that these actions, in the course of a deposition (as distinguished from a private exchange) were prejudicial to the administration of justice.

*Segel* is a persuasive indication that respondent also committed misconduct. While the words respondent used were not quite as profane as those at issue in *Segel*, respondent's statements were more prejudicial to the administration of justice than were those at issue in *Segel*, since they were deliberately insulting (rather than the result of an uncontrolled outburst),[5] they were demeaning in multiple depositions rather than just a single hearing, and he respondent was obstructive, in addition to being insulting.

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3 When we suggest the possibility that, on the facts of this case, no single instance of respondent's abusive conduct, standing on its own, rises to the level of a violation of the rules, we do not mean to suggest that we think respondent behaved appropriately. Rather, we are reflecting a reality that no one - not this Panel, not the Board, not the Grievance Administrator and not the Bar - wants every literal violation of the MRPC to be the subject of disciplinary proceedings. To prevent that, opinions sometimes say that certain inappropriate conduct does not violate the rules, when what really seems to be meant is that in the judgment of the Board, the particular infraction was not serious enough to warrant disciplinary proceedings. So it is here. We think respondent violated the rules of professional conduct every time he deliberately insulted or embarrassed opposing counsel. However, we would be reluctant to find that a single instance of this sort of insult was serious enough to warrant invoking the disciplinary process.

4 See n.14, below.

5 It is significant that, unlike *Administrator v. MacDonald*, this case is about public statements during legal proceedings. *Cf.* 00-4-GA. While there are undoubtedly situations in which even a private conversation between attorneys could be so disrespectful or offensive that it would rise to the level of misconduct, offensive private conversations are less likely to impact the administration of justice than is demeaning an opponent during official proceedings in the presence of third parties who have no choice but to be present, such as witnesses, clients and court reporters.

We also find it useful to turn the question around: Can we say that a lawyer who deliberately and repeatedly embarrasses, demeans and obstructs opposing counsel through the use of inappropriate language in the presence of witnesses, court reporters and parties has *not* acted contrary to the administration of justice? We cannot imagine that the answer to this question is "yes." For this reason, too, we conclude that the Master is correct.

Respondent raises several challenges to the Master's conclusions. He characterizes the many statements which the Master found to be deliberately insulting as "situations in which respondent made statements in response to those initiated by other participants in the depositions in order to clarify the record or otherwise protect his clients' interests." (Brief in Support of Respondent's Objections to Master's Report at 1.) Respondent's own testimony did attempt to establish this point. Indeed, we found his testimony noteworthy for the fact that, in his effort to establish this point, respondent did not acknowledge that he made a single inappropriate comment in any of the many instances in which the Master found or the Administrator alleged that his comments were a part of a pattern of misconduct - not when he called opposing counsel a nitwit and told the client that he should get another lawyer;[6] not when he repeatedly called opposing counsel an asshole and accused him of acting like a hyena and an idiot;[7] not when he called another opposing counsel an idiot;[8] not when he told opposing counsel (who objected to respondent's mid-deposition complaints about the location of the deposition) that he was yelling like "a madman" and "a crazy man";[9] not when he called opposing counsel a buffoon;[10] not when he told opposing counsel that she was stupid and shameful, that it was pathetic that her client was paying for her representation, and she had better behave;[11] not when he told another opposing counsel that he was shameful, and that he could not handle the truth;[12] not when he told opposing counsel to get his "stink" out of a deposition,[13] not in any of the other many instances of disruptive, patronizing or insulting conduct that were cited by the Master or that appear in the exhibits - in fact, not ever.

We reject this defense as a matter of both fact and law. As to the facts, our review of respondent's testimony convinces us that the Master was correct that respondent's rationalizations for these and other comments ring very hollow. For one thing, one gets the clear impression that respondent was being less than candid with the Master when he testified about his motives for making the inappropriate comments he did. But, whether or not he was being candid, his testimony completely fails to establish that he had a legitimate purpose for the many comments which the Master and we find to be improper. Although respondent characterizes his remarks as justified responses to instigation by opposing counsel, our own review of the record shows that respondent's statements were never justified, and most often, it was actually respondent himself who initiated and perpetuated the interaction in which he behaved unprofessionally. See, e.g., Exhibit I at 4; Exhibit K at 57, 64; Exhibit M at 19. Accordingly, just as the Master did not accept respondent's "lengthy and at times tiresome justifications" for his conduct, neither do we. (Report at 12.)

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6 Exhibit A at 91.
7 Ex. Q at 6-8.
8 Exhibit I at 4.
9 Exhibit E at 89, 90.
10 Exhibit C at 20.
11 Exhibit L at 38-39, 43, 64.
12 Exhibit O at 87-88.
13 Hearing 2/24/04 at 5-6, 11.

Even if the record reflected that respondent really was provoked to make his unprofessional and insulting comments, as he claims, we would still be required to reject his defense as a matter of law. See *Administrator v. Fink*, 96-181-JC (1998), in which the respondent defended against a charge of misconduct, which was based on his assaulting a witness at a deposition, by arguing that the witness had provoked him (the witness had called respondent a "lying son of a bitch" and similar terms). The Board held that provocation is no defense to misconduct. The same is true here.

Respondent argues that most of the attorneys who were the victims of his verbal abuse did not themselves think he committed misconduct.[14] The opinion of a victim that respondent was not attempting to embarrass or belittle him might be relevant in the context of the charges here, but it does not appear to us that any of the victims testified to that effect. On the other hand, to the extent that any victim gave an opinion as to the ultimate question, whether respondent's actions constituted misconduct, that opinion is irrelevant.[15] As the Grievance Administrator notes, only the Master (and now the panel) have had the benefit of reviewing evidence, considering precedent and weighing the pattern of respondent's conduct.

Moreover, the testimony of the few victims of respondent's attacks who were called as witnesses cannot fairly be characterized as opining that respondent did not commit misconduct. Mr. Morganti was the opposing counsel in the *Moir* deposition, Exhibit A. Our review of that deposition shows that without significant provocation, respondent referred to Mr. Morganti as a

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14 Respondent also suggests that the Grievance Administrator could only find questionable conduct in about 16 of the more than 1000 depositions he has conducted. There is no evidence in the record that anyone made any systematic effort to review respondent's depositions to identify all in which he insulted or demeaned his opponents, or to determine whether those which are not the subject of this proceeding reflect proper conduct. Therefore, to the extent respondent is suggesting that we should infer that he behaved properly in all depositions that are not the subject of the charges brought by the Grievance Administrator, there is an inadequate foundation for that conclusion.

Indeed, to the extent the record establishes anything about the depositions which are not the subject of the complaint, it *dis*courages us from inferring that respondent conducted himself appropriately in them. The record shows, for example, that respondent was alleged to have behaved profanely and inappropriately in another deposition in the matter of *Coleman v. Wasserman*. (Hrg. 6/16/04 at 55-56, 67-68.) And the opposing counsel in that matter noted that the events captured in Exhibit C were "typical of what has transpired in depositions in our cases. I have not taken a deposition, sir, where you have not made a personal insult to some attorney in the room or the witness." (Exhibit C at 23.) *See also* Exhibit B at 111 (after series of personal and degrading comments exchanged between counsel, opposing counsel informs respondent that his reputation is that he behaves this way with every defense attorney).

We do not rely on this evidence concerning other depositions to establish the misconduct we find in this case. We note that the record of the uncharged *Coleman* incident is incomplete (the only portion of deposition transcript that is referenced refers to respondent stating that opposing counsel has blown something out of his ear, but does not purport to include the alleged profanities). We cite this evidence only to illustrate why we are unwilling to assume, as respondent asks, that respondent behaved appropriately in every deposition which does not form part of the complaint.

15 That is especially the case here, where the misconduct rests on the aggregate of respondent's actions in multiple depositions. No one victim was aware of that aggregate, so no one victim was in a position to express a meaningful opinion.

nitwit and told Mr. Morganti's client that the client should get a new lawyer. (Exhibit A at 87-91.) Mr. Morganti understood respondent to be mocking him, and thought respondent was either trying to provoke him or intimidate him. He considered respondent's actions to be a violation of the MRPC. (Hrg. 2/23/04 at 57.) However, in response to a question from respondent's counsel, he testified that he did not consider this to be the sort of violation he was *required* to report to the Grievance Administrator by MRPC 8.3. (Id. at 61.) In explaining why he chose not to file a grievance, he also testified that he did not want to become embroiled in a dispute with respondent that would redound to the detriment of his client. (Id. at 57.) It does not follow that Mr. Morganti believed that respondent had acted properly under the rules.

It is also obvious that Mr. Rinkle, the opposing counsel in the greatest number of the depositions in which respondent engaged in the conduct which we find to be improper, was under the impression that respondent did violate the MRPC. As the Master notes, the fact that Mr. Rinkle did not perceive that he was obligated, under Rule 8.3, to file a complaint any sooner than he did, does not suggest that he thought respondent's conduct was acceptable under the rules.[16]

Respondent argues that he cannot have prejudiced the administration of justice because all of the depositions in question actually proceeded to conclusion. Respondent relies on too narrow a definition of prejudice. When the improper conduct of an attorney causes a loss of respect for the judicial process or opposing counsel, the administration of justice has been prejudiced even when a deposition is completed. The administration of justice is also prejudiced when the improper conduct of an attorney intimidates a witness or a party. As noted elsewhere in this opinion, respondent apparently developed a reputation for making personal attacks on opposing counsel.[17] That reputation created a climate which increased the odds that future depositions would be interrupted or terminated as a result of a bad interaction between counsel.

We are satisfied that respondent's repeated personal attacks on opposing counsel had this impact. As the Master noted, depositions, where there is no judge to umpire the proceedings, are no place for insulting, patronizing, scolding or lecturing. See *Grievance Administrator v. Segel*, 95-210-GA. "[W]e can envision no case in which it would be proper to insult, belittle, or demean any person . . . . " *Weiand v. Florida*, 701 So2d 562, 565 (Fl. Ct. App. 1997), *rev'd on other grounds*, 732 So2d 1044 (Fl. S. Ct. 1999).[18] The Maryland Court of Appeals squarely rejected the argument that the administration of justice is not prejudiced when inappropriate speech is used during legal proceedings:

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16 Respondent also argues that another opposing counsel, George Zemnickas, testified that he thought there was no misconduct during the deposition that is recorded in Exhibit E. (Respondent's Objections to Master's Report at 3 n.5.) However, a review of Mr. Zemnickas's testimony shows that in procuring this testimony counsel for respondent had focused Mr. Zemnickas on a less offensive part of respondent's conduct than that in which respondent accused Mr. Zemnickas of "yelling like a madman" and "continuously yelling like a crazy man." (Hrg. 2/23/04 at 74.) Counsel for respondent never asked Mr. Zemnickas whether he considered these latter comments to be misconduct.

17 See n.14, above.

18 Respondent notes that *Weiand* was a criminal case, not one that involved attorney misconduct. He is correct, but that has little bearing on the legitimacy of *Weiand*'s observation about proper attorney conduct.

> That such conduct does not at the moment of its occurrence delay the proceedings or cause a miscarriage of justice in the matter being tried is not the test. Conduct of this type breeds disrespect for the courts and for the legal profession. Dignity, decorum, and respect are essential ingredients in the proper conduct of a courtroom, and therefore in the proper administration of justice. [*Attorney Grievance Commission v. Stuart L. Alison*, 317 Md. 523, 536 (Md. Ct. App. 1989).]

Respondent contends that finding that the administration of justice has been prejudiced by his conduct so expands the concept of prejudice that it will chill aggressive advocacy. We disagree. The linchpin of the Master's finding, which we adopt, is that respondent deliberately and in a calculated fashion insulted and demeaned his opponents and obstructed their questioning of witnesses. There is no risk that future litigants will confuse aggressive advocacy with deliberately insulting and obstructive advocacy.

Similarly, respondent contends that he was only attempting to protect his clients' interests. This justification also rings hollow. As the Master found, in the circumstances presented here respondent had no need deliberately to insult or obstruct any opponent in order to protect any of his clients' legitimate interests.

Respondent suggests that the Master has "decried" him because he was "passionate," "engaged" and "on the switch." (Brief at 7.) That is not accurate. The Master found that respondent deliberately insulted and obstructed his opponents, and that his doing so was calculated. She specifically found that his actions were not the result of passion, and the evidence supports her finding.[19]

For all of these reasons, we find that respondent's comments during the depositions referred to by the Master were prejudicial to the proper administration of justice, in violation of MRPC 8.4(c) and MCR 9.104(A).

We also find that respondent's conduct violated MRPC 6.5(a). Rule 6.5(a) states in part that "a lawyer shall treat with courtesy and respect all persons involved in the legal process." The Master was reluctant to find a violation of Rule 6.5, a reluctance which was understandable because the outer contours of the rule are not immediately clear and there is little precedent concerning its application. Although we understand her concern, we reach a different result.

In reaching that result, we now reject respondent's contention, raised in a pre-hearing motion to dismiss, that Rule 6.5 is unconstitutionally vague or overbroad. Respondent argues that a reasonable person cannot know what conduct is forbidden by Rule 6.5(a). To support his argument, he posits a series of hypothetical ways in which a lawyer's words might or might not be considered "disrespectful." For example, he worries that under Rule 6.5(a), a lawyer might be charged with misconduct for failing to tip his hat to a litigant, or failing to wish a "good morning" to a judge, failing to salute an officer or failing to say "god bless you" after someone sneezes, and other similar concerns. (Brief in Support of Motion for Summary Disposition at 2-3.) Respondent argues that from the uncertainty surrounding his hypothetical examples it follows that Rule 6.5 is invalid.

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19 The Master's finding No. 9 noted that respondent behaves very differently depending on whether he is in a deposition or before a judge, and summarized the evidence which supports this finding. This was part of the reason the Master concluded that respondent acted with deliberation, rather than out of passion.

In this case, of course, the Master did not find that respondent failed to tip his hat or otherwise failed to live up to some arbitrary standard of respect. Rather, she found that respondent repeatedly and deliberately embarrassed and demeaned opposing counsel. That makes this case similar to *Grievance Administrator v. Warren*, 01-16-GA, decided after respondent challenged Rule 6.5(a) in this case, in which the Attorney Discipline Board considered and rejected essentially the identical argument:

> The Board has also considered respondent's argument that Michigan Rule of Professional Conduct 6.5(a) is unconstitutional for the reason that it suffers the fatal defects of vagueness and overbreadth. . . . The challenge before the Board is . . . with respect only to the first sentence of MRPC 6.5(a) which states: "A lawyer shall treat with courtesy and respect all persons involved in the legal process." While respondent raises many interesting and thought-provoking hypothetical situations which explore the gray areas between "courtesy" and "discourtesy," and "respect" and "disrespect," it is not necessary for the Board to venture into those areas in this case. This is not a case about failing to salute an officer, or failing to tip one's hat, or failing to say "God bless you" after someone sneezes. This is a case about a lawyer's yelling, screaming, belittling, harassing and threatening conduct. . . .
>
> The Board declines, therefore, to consider whether or not MRPC 6.5 as written is overly broad or vague when applied to hypotheticals of the type offered by respondent. The respondent's conduct, as found by the hearing panel, would clearly be covered under even the most narrow interpretation of that rule. See *In re Chmura*, 461 Mich 517, 544 (2000). [*Warren*, *supra*, pp 5-6.]

We similarly decline respondent's invitation here. We believe that deliberately embarrassing and demeaning opposing counsel during depositions would be covered under even a narrow interpretation of Rule 6.5(a).

We also think the rule is not reasonably susceptible of the concern expressed by respondent. That is, we think the most natural interpretation of Rule 6.5(a) provides a reasonable degree of notice and certainty. We understand the rule to be primarily directed to those situations in which an attorney *deliberately* demeans or embarrasses or is discourteous to another participant, for no legitimate tactical reason, in a legal matter in which the attorney is also engaged.[20]

The goal of Rule 6.5(a), to require attorneys to maintain a degree of civility in the practice of law, is certainly important to the efficient and effective functioning of the legal system and to maintaining respect for that system. This is a reasonable limitation on attorney conduct.

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20 Cf. MRPC 4.4 ("a lawyer shall not use means that have no substantial purpose other than to embarrass . . . another person"). The alternative to Rule 6.5(a), it seems to us, is that the Bar cannot have a meaningful rule which requires attorneys to treat others with civility and respect. We think such a rule serves a worthwhile purpose in regulating the conduct of the Bar, and see no good reason why it should be unconstitutional to regulate attorney behavior in this way.

"Membership in the Bar is a privilege burdened with conditions." *In re Rouss*, 221 NY 81, 84 (1917)(Cardozo, J.). "Upon admission to the Bar, a lawyer accepts and agrees to be bound by rules of conduct significantly more demanding than the requirements of law applicable to other members of society." *Commissioner v. Alison*, 317 Md. at 535. Rule 6.5(a), as we understand it, is a reasonable means to achieve that goal, especially in the context of judicial proceedings, such as the depositions that are the subject of this case. "It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071 (1991).

Having accepted the Master's well supported finding that respondent deliberately embarrassed and demeaned his opposing counsel more than a dozen times during depositions, we are compelled to then conclude that respondent did not treat his opposing counsel with the minimal courtesy and respect required by Rule 6.5.

Finally, we consider separately respondent's filing Exhibit N in the *Evans* case. On July 5, 2001, respondent participated in a deposition of a nurse.[21] The audiotape of the deposition is Exhibit S. The tape reveals that during the deposition respondent became displeased that opposing counsel was objecting to some of his questions. Respondent made some mildly denigrating remarks, to which opposing counsel took exception. There was a brief and mildly heated exchange, after which opposing counsel gathered his composure and was prepared to proceed. The tape shows that rather than continue the deposition, respondent continued to speak in a demeaning way and with a condescending voice to opposing counsel, with the apparent intent of provoking a further response. No response was forthcoming, and respondent abruptly terminated the deposition notwithstanding opposing counsel's willingness to continue.

The next day respondent filed a motion in the Evans matter in which, among other things, he sought a protective order which would remove opposing counsel from the case and compel the continuation of the deposition with an armed deputy sheriff present. In support of the motion, respondent alleged that during the deposition the day before, opposing counsel,

> unprovoked and for reasons unknown, became belligerent, hostile, and launched into a maniacal tirade; yelling, screaming and gesturing in a threatening fashion (the transcript and audio tape of this shameful display will be provided to the Court) . . . . It is apparent that [opposing counsel] is mentally disturbed and poses a present danger to [respondent] and others . . . . This is not the first time that [respondent] and the Court have been the brunt of [opposing counsel's] psychotic tantrums . . . .

In other words, respondent unjustifiably provoked an incident during the deposition, inflamed that incident when it was in danger of cooling down, then mischaracterized both the origin and nature of the incident as the basis for unfairly disparaging opposing counsel in a written pleading.[22]

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21 The cover page of the transcript, Exhibit M, asserts that the deposition took place on *June* 5, not July 5. This appears to be an error.

22 Respondent's treatment of opposing counsel in Exhibit N is strikingly similar to his treatment of a different opposing counsel, at a different time, in connection with a different deposition, as embodied in Exhibit U.

The Master found "overwhelming evidence" that the portions of Exhibit N just described were included in the motion merely to harass and intimidate opposing counsel. (Finding of Fact 10.) Based on that finding, the Master concluded that the filing of Exhibit N violated MRPC 4.4. It is not clear whether the Master found that the filing of this motion also violated Rules 6.5(a) and 8.4(c).

Rule 4.4 states that a lawyer shall not use means that have no substantial purpose other than to embarrass a third person. Respondent objects to the Master's conclusion. He asserts, asserting that Exhibit N was filed to prevent opposing counsel from yelling at respondent in a future deposition. The Master concluded that respondent's testimony in this regard was "specious." (Report, Finding of Fact 10.)

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By way of background for this other incident, in 1997 respondent participated in the deposition of a medical expert. (Exhibit C.) The Master found that respondent's conduct during this deposition was a part of the pattern of insulting and embarrassing behavior that violated the MRPC. (Finding of Fact #2 n.2)

Exhibit C, beginning at p. 10, demonstrates that the pertinent exchange with opposing counsel was triggered at the beginning of the deposition in question when opposing counsel attempted to have the expert identify the records on which the expert had relied. Respondent interrupted to answer the question himself, and refused to relent even when opposing counsel repeatedly stated that he wanted the expert to testify rather than respondent. Respondent then told opposing counsel to "be quiet" and to "shut up" when opposing counsel asked that the testimony come from the expert. The transcript does not reflect that opposing counsel said anything particularly exceptional during the exchange that followed, but respondent nonetheless told opposing counsel that he would not sit for counsel having a tantrum like a three year old; that opposing counsel was acting like a child, like a little two year old throwing a tantrum who should be embarrassed and ashamed of himself; that opposing counsel was an embarrassment to the profession and that he was shameful; that he had become uncontrollable; that he was acting like a buffoon; and again that he had acted like a little child. (Exhibit C at 14-24) Exhibit C also makes clear that respondent was very patronizing toward opposing counsel throughout the exchange.

Following this deposition, respondent filed a motion for a protective order. In that motion, respondent alleged that:

> without provocation opposing counsel "flipped out" during the deposition and became incensed for no reason, his face flushed with anger and was working himself into a lather. . . . [Respondent] cautioned him to collect himself . . . . This only further enraged defense counsel, now with his head engorged with blood and his hands trembling . . . . That moment came when despite [respondent's] repeated plea for restraint, defense counsel began screaming and wailing away like a maniacal mad man. . . . Such ghoulish conduct on the part of defense counsel should not be tolerated in a civilized society. [Exhibit U.]

In other words, as with Exhibit N, it appears to us that respondent provoked opposing counsel into a reaction, fanned the flames of that reaction with offensive and patronizing language, then filed a motion in which he mischaracterized both the cause of the incident and the nature of opposing counsel's conduct during the incident, on which basis he impugned the mental status of opposing counsel. Although Exhibit U is not part of the charged misconduct here, it helps to demonstrate that respondent's filing of Exhibit N was no accident, but was another deliberate attempt to embarrass an opponent.

We also believe that the cited portions of Exhibit N, which were a deliberate attempt to embarrass opposing counsel in connection with a legal proceeding, violated respondent's duty under Rule 6.5 to treat opposing counsel with courtesy and respect. Finally, we believe that impugning the mental stability of a member of the Bar, without legitimate cause, in a public pleading, prejudices the due administration of justice by unfairly breeding disrespect for the legal profession and exposing the profession to contempt, in violation of Rule 8.4(c) and MCR 9.104(2).

Having concluded that respondent did commit misconduct in the particulars described above, this matter will be set for a hearing to determine the appropriate sanction.

ATTORNEY DISCIPLINE BOARD
Tri-County Hearing Panel #15

By: _____
Lynn A. Helland, Chairperson

A TRUE COPY
ATTORNEY DISCIPLINE BOARD

BY _____

STATE OF MICHIGAN

# Attorney Discipline Board



GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

v

Case No. 02-78-GA

ALBERT J. DIB, P 32497,

Respondent.
_____/

## REPORT ON DISCIPLINE OF TRI-COUNTY HEARING PANEL #15

**PRESENT:** Lynn A. Helland, Chairperson
Michael J. Balian, Member
Carl L. Bolden, Jr., Member

**APPEARANCES:** Nancy Alberts, Associate Counsel
for the Attorney Grievance Commission

Michael A. Schwartz
for respondent

## I. EXHIBITS

None

## II. WITNESSES

Hon. Dawn Marie Gruenburg
Gerald Allen Shiener
Fred Dilley
Albert Dib

## III. HEARING PANEL REPORT ON MISCONDUCT

On July 3, 2006, the hearing panel filed its report on misconduct, finding that the charge in the complaint, that respondent deliberately embarrassed and belittled his opponents during fourteen depositions and in a filed pleading, were all established.

On this basis, we found that respondent engaged in professional misconduct in violation of MRPC 6.5(a) and 8.4 (a) and (c), and MCR 9.104(A)(4).

## IV. REPORT ON DISCIPLINE

### A. Panel Proceedings

The panel convened on September 27, 2006, to conduct a separate hearing on discipline, as required by MCR 9.115(J)(2).

The Grievance Administrator offered no additional evidence tending to show aggravating or mitigating circumstances. Counsel did note that the panel found that respondent had deliberately violated the Rules of Professional Conduct, and had deliberately treated the disciplinary process with a lack of candor. Counsel argued that ABA Standard 6.21 states that a reprimand is an appropriate remedy only when an attorney *negligently* violates the rules of professional conduct, while ABA Standard 6.22 states that suspension is the appropriate remedy for a *deliberate* violation. Therefore, the Administrator argued, suspension is the appropriate remedy here. The Administrator took the position that Mr. Dib should be suspended for a period long enough to require him to apply for reinstatement to practice law, to require him to demonstrate that he had indeed come to understand and renounce the behavior on which the finding of misconduct was based, and contended that a six month suspension was the minimum necessary to accomplish that purpose.

Respondent called three witness in addition to himself. Hon. Dawn Gruenberg testified that in her experience, respondent has been among the most ethical attorneys she has known. She and Dr. Gerald Shiener testified that in their experience, respondent did not behave in the manner he was found to have behaved by the panel. Fred Dilley, Esq., testified that in his opinion the panel was mistaken to conclude that respondent's actions were unprofessional. Mr. Dilley stated that Mr. Dib might push the envelope of professionalism in his zealous advocacy, but in Mr. Dilley's opinion he did not leave the envelope.

Respondent testified that for much of his career he has engaged in a variety of activities to improve the practice of law and promote the Wayne State University law school. He testified that he suffered from medical problems, one consequence of which is that he became impatient at depositions. He testified, contrary to the panel's finding, that he was justified in filing Exhibit N (the pleading in which, as the panel found, respondent made unfounded allegations concerning the mental status of his opponent, after having deliberately precipitated the incident on which the pleading was based). He testified that his only motive, in all the instances in which the panel found misconduct, was to represent his clients with zeal. He described his impression that he is at a disadvantage when pursuing the interests of his clients, because of the vast array of resources opposing him, and suggested that this perception that he is an underdog contributed to his approach in depositions. In response to cross-examination, it was not clear whether respondent acknowledged that he had engaged in inappropriate conduct.

Counsel for respondent noted that respondent has no prior disciplines in 25 years of practice. He noted that respondent did not have a dishonest or selfish motive for his actions. Counsel took the position that respondent cooperated with the proceedings, and to the extent the panel was of the opinion that respondent was less than candid about his actions, counsel asserted that respondent was not trying to deceive, but was merely taking a "subjective view" of his own actions. Counsel also took the position that respondent did not initiate any of the situations that gave rise to the panel's findings of misconduct. For all of these reasons, counsel for respondent argued that the sanction should be no more than a reprimand.

The panel in this case also has the benefit of the recommendation of the Special Master. The Master, who had the opportunity to observe respondent first-hand over the course of eleven days of hearings, acknowledged that it was not part of her mandate to recommend a sanction, but nonetheless suggested that suspension would not be appropriate.

## B. Findings and Conclusions

The panel is obligated to use the American Bar Association's Standards for Imposing Lawyer Sanctions following its finding of misconduct. *Grievance Administrator v Lopatin*, 462 Mich 235 (2000). In that opinion, the Supreme Court laid out the steps we must follow, which include identifying the ethical duty violated by the lawyer; identifying the lawyer's mental state; determining the extent of the actual or potential injury caused by the lawyer's conduct; and, finally, considering appropriate aggravating and mitigating factors.

With *Lopatin* in mind the panel finds that ABA Standards 6.22 and 7.2 guide our decision. That is, we have already found that respondent deliberately took actions in several depositions which caused or potentially caused interference with legal proceedings (Standard 6.22), and which violated his duty as a professional and thereby caused damage or potential damage to the legal system (Standard 7.2).

Both of these Standards state that suspension is "generally" the appropriate remedy for a violation. However, for the reasons that follow, we conclude that a reprimand, rather than suspension, is the appropriate sanction in this case.

First, although it is inherently difficult to measure an intangible injury such as the harm to the legal profession or interference with legal proceedings as a result of respondent's conduct, our sense is that in this case the harm and potential harm were small.

Second, we accept respondent's characterization of his actions as resulting from a desire to be a zealous advocate. We recognize that few past Board opinions have grappled with the line we wrestled with here, that is, the line between zealous and over-zealous advocacy. In light of the absence of clear precedent we are reluctant to suspend an attorney for crossing that line, even an attorney who did so repeatedly over a period of years.

We also find support for a reprimand, rather than suspension, in the fact that respondent has had no prior finding of misconduct (ABA Standard 9.32(a)), and was not operating from a selfish or dishonest motive (ABA Standard 9.32(b)).[1]

The Grievance Administrator has quite properly noted that there are two significant aggravating factors which we must consider. As we noted in our opinion finding misconduct, respondent appeared to be "less than candid" in his testimony before the Master. ABA Standard

[1] Although respondent offered evidence suggesting that his actions may have resulted in part from certain physical disabilities which cause him to be ill-tempered, see ABA Standard 9.32(h), we discount that factor in our decision. Respondent testified at length concerning his actions, and his motives for his actions, during the hearings before the Master. He never hinted then that his actions were even improper, much less that any impropriety was the result of a physical problem. Accordingly, we give that factor no weight in our decision now.

9.22(f) states that it is an aggravating factor for a respondent to engage in deceptive practices during a disciplinary proceeding. In addition, as the Grievance Administrator notes, even as of the sanction hearing respondent appeared to take the position that, in his mind, he had done nothing improper. ABA Standard 9.22(g) states that refusal to acknowledge wrongful conduct is also an aggravating factor.

After considering these aggravating factors, we conclude that they do not warrant a suspension in this case. We are certainly troubled by respondent's apparent inability to acknowledge that he acted inappropriately. And we are mindful that in past cases, a lack of candor with the administrative process was a basis for the Attorney Discipline Board to significantly increase sanctions that were otherwise appropriate. *See, e.g., Grievance Administrator v. Levant*, 94-200-GA (1996)(Board increased suspension from 30 days to two years because respondent repeatedly lied to the panel during the disciplinary process); *Grievance Administrator v. Whelan*, 92-231-GA (1993)(Board increased sanction from reprimand to 60 day suspension because of respondent's demonstrated disdain for the disciplinary process); *Grievance Administrator v. Meden*, 92-106-GA (1993)(in the course of increasing a sanction from 18 month suspension to revocation, the Board stated: "we can conceive of few factors deserving of greater weight in aggravation than a finding that an attorney has given false testimony during disciplinary proceedings").

Nonetheless, we conclude that on the rather unique facts of this case, no increase is warranted on this basis. While we were left with the impression that respondent was not candid when describing the conduct which resulted in charges being brought against him, we are mindful, as noted by respondent's counsel, that respondent was testifying as to a particularly subjective matter - his motivation for his actions. We are not as comfortable aggravating the sanction on this basis as we would be had respondent testified falsely as to something more objective than his state of mind. In reaching this conclusion, we note as well that the Master, who had the opportunity to see respondent testify in person and similarly appeared to be troubled by that testimony, nonetheless recommended that a reprimand is the appropriate sanction.

As to respondent's unwillingness to acknowledge that he acted unprofessionally, it appears to us as though respondent may simply be incapable of acknowledging personal wrongdoing. Were we to conclude, from that, that respondent is likely to be a repeat offender, we would consider this inability to be a serious aggravating factor. However, our perception is that no matter the extent to which respondent may engage in word games with the panel, or the grievance administrator, or the Master, in lieu of addressing the propriety of his actions, in reality he is not likely to be a repeat offender. If we are wrong in that regard, his future misconduct can appropriately be dealt with in a future proceeding.

For all of the reasons just stated, we do not believe respondent should be suspended from the practice of law. On the other hand, we believe that any sanction less than a reprimand would understate the seriousness of respondent's deliberate and repeated actions, and would encourage him to continue to deny his misconduct to himself. Accordingly, having carefully weighed all of these factors, we conclude that respondent should receive a reprimand.

## V. SUMMARY OF PRIOR MISCONDUCT

None